Supreme Court, U.S.
FILED

091044 DEC 16 2009

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

Riley Briones, Jr., and
Ricardo Briones,

Petitioners

vs.

United States of America,

Respondent

ON APPEAL FROM THE JUDGEMENT OF THE
NINTH CIRCUIT COURT OF APPEALS

APPENDIX

Riley Briones, Jr. #41865-008 Pro Se
Federal Correctional Institution
37910 N. 45th Ave.
Phoenix, Arizona 85086

Ricardo Briones #42207-008 Pro Se
Federal Correctional Institution
P.O. Box 9000
Safford, Arizona 85548

APPENDIX A-MEMORANDUM*

NOT FOR PUBLICATION

FILED NOVEMBER 30, 1998

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 97-10369
NO. 97-10370
NO. 97-10371
NO. 97-10372
D.C.NO. CR-96-00464-RCB

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

RILEY BRIONES, SR.,
RICARDO BRIONES,
RILEY BRIONES, JR., AND
PHILBERT J. ANTONE,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Arizona (Phoenix)
Robert C. Broomfield, District Judge, Presiding
Argued and Submitted September 15, 1998
San Francisco, California

Before: CHOY, CANBY, AND KLEINFELD, Circuit Judges.

Introduction

This appeal involves the consolidated cases of four defendants: Riley Briones, Sr. ("Riley Sr."),

Appendix A

Ricardo Briones ("Ricardo"), Riley Briones, Jr. ("Riley Jr."), and Philbert Antone ("Antone"). Defendants appeal their respective convictions on several counts, including murder, arson, and conspiracy to participate in a racketeering enterprise.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

We AFFIRM on all issues except for the ineffective assistance of counsel claim which we REJECT WITHOUT PREJUDICE.

Analysis

Each Defendant raises several arguments on appeal, some of which overlap. We address each in turn.

I. Severance of trial

A. Riley Sr.

Riley Sr. argues that the district court's refusal to sever forced him to abandon a defense which was antagonistic to his codefendants. But a defense in which Riley Sr. denied any knowledge or participation in his codefendants' activities would not have been "irreconcilable." United States v. Throckmorton, 87 F. 3d 1069, 1072 (9th Cir. 1996). Even if Riley Sr. had suggested his codefendants' guilt in asserting his own lack of involvement, the jury could still find that the Government failed to prove the charges against them beyond a

reasonable doubt. See United States v. Cruz, 127 F. 3d 791 (9th Cir. 1997).

B. Ricardo

Ricardo argues that he was prejudiced by being brought to trial with codefendants who were charged with a "laundry list" of crimes for which he was not charged. But joinder was appropriate because the Defendants were charged with acts of conspiracy, some committed by Ricardo and some committed by his codefendants. See United States v. Hernandez, 952 F. 2d 1110, 1114 (9th Cir. 1991). This case is unlike United States v. Satterfield, 548 F. 2d 1341, 1345 (9th Cir. 1977), which rejected joinder because the bank robberies committed by one defendant alone were unrelated to the ones committed jointly by both defendants. Here, the charges faced by Ricardo were related to the series of offenses committed by his codefendants.

II. Photographs (Riley Sr.)

Riley Sr. appeals the admission of two photographs into evidence. One depicted Riley Sr. in the midst of a group of Eastside Crip gang members ("ESC"), and the other depicted his four year-old daughter wearing a blue bandana and holding a gun. These photographs were relevant to show Riley Sr.'s association with the ESC, proof of which was necessary to the RICO conspiracy charge. There is no indication that the pictures were used as improper character evidence. Instead, they corroborated the statements of witnesses who

testified that Riley Sr. supported, perpetuated, and recruited members into the gang. Moreover, the pictures do not appear unduly prejudicial or particularly inflammatory.

III. John Webster's change of plea and testimony

After trial began and a main Government witness had already testified, codefendant John Webster changed his plea and agreed to testify against the remaining Defendants. The Defendants challenge the district court's decision to allow Webster's testimony.

Generally, mistrial is not automatically required when a codefendant changes his plea mid-trial, even when that codefendant testifies against the remaining defendants. See United States v. Pierro, 32 F. 3d 611, 617 (1st Cir. 1994). Granted, Webster's testimony proved damaging to the Defendants in this case. But the district court properly instructed the jury to examine Webster's testimony with greater caution than that of ordinary witnesses and to consider any influence to prevent any unfair prejudice. See Pierro 32 F.3d at 618 n. 7.

Additionally, the argument that the Government violated 18 U.S.C§ 201 (c) (2) by promising leniency in exchange for Webster's testimony is unpersuasive. The decision cited by the Defendants, United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), has been vacated pending a rehearing en banc by the Tenth Circuit.

IV. Sufficiency of evidence

A. Riley Sr.

Riley Sr. argues that "mere association" with members of a conspiracy was insufficient to make him a coconspirator. But there was sufficient evidence indicating that Riley Sr. manifested "an agreement to conduct or participate in the affairs [of the ESC] through a pattern of racketeering." United States v. Blinder, 10 F. 3d 1468, 1477 (9th Cir. 1993). For example, he acted as a counselor to the gang when it committed crimes and harbored an arsenal of firearms at his house for the use in the gang's drive-by shootings. This evidences an ongoing relationship in which Riley Sr. manifested his agreement with the ESC's illegal activities. See, e.g., United States v. DeRosa, 670 F. 2d 889, 896 (9th Cir. 1982).

B. Ricardo

Ricardo focuses his appeal on the "enterprise" requirement of the statute. He argues that RICO does not apply to "neighborhood gangs," only organized crime. But the RICO statute does apply to the informal organizations such as criminal gangs. United States v. Rogers, 89 F. 3d 1326, 1337 (7th Cir. 1996). Unlike the fraud scheme in Chang v. Chen, 80 F. 3d 1293 (9th Cir. 1995), the ESC gang contained a leadership structure. Older members were known as "Original Gangsters," while the younger members were known as "PeeWees." Thus, there was sufficient evidence of a system of authority.

C. Antone

Antone's argument that there was no evidence of his agreement to participate in the ESC's affairs is without merit. The record contains evidence that the Subway store robbery and murder were his idea. It also indicates that Antone purchased the pistol used to kill the clerk. As in the case of his codefendants, there was sufficient evidence to support Antone's conviction on the RICO conspiracy count.

V. Jury instructions (Riley Sr.)

A. Aiding and abetting instruction

Riley Sr. objects to the advisement that the Government was not required to show precisely which defendant committed the offense and which defendant aided and abetted. But this instruction was a correct statement of the law. See United States v. Vaandering, 50 F. 3d at 702. Regardless, no Defendants in this case were convicted on any counts with which they were not charged. In fact, the jury found Riley Sr. innocent on Count 13. Hence, there is no indication that the jury was confused about which counts and which evidence applied to which defendants.

B. RICO instruction

Riley Sr. objects to the district court's refusal to change the word "and" to "both" in instructing the jury on the RICO conspiracy count. But choice of the word "and" more than adequately conveys the Government's burden of proof. Use of the word

"both" would provide negligible emphasis, if any.

VI. Speedy trial (Ricardo)

Ricardo argues that the Government violated his right to a speedy trial by charging him in two cause numbers, and then charging him with the same offenses later in a new cause number. But the Government was simply complying with the Juvenile Delinquency Act when it proceeded against Ricardo first as a juvenile before filing a motion to proceed against him as an adult. There is simply no indication of delay tactics.

VII. Arlo Eschief's hearsay testimony

The Defendants argue that the district court should not have admitted certain statements made by Arlo Eschief to detectives. But the hearsay statements in question qualify for the penal interest exception pursuant to Fed. R. Evid. 804 (b) (3) because they subjected the declarant to criminal liability. See United States v. Williams, 989 F. 2d 1061, 1068 (9th Cir. 1993). Specifically, a reasonable person in Eschief's shoes would know that statements concerning the purchase and disposal of the gun would assist the police in locating it. Although neutral on its face, the statement that he hung around Riley Jr. and company linked him to those involved in the conspiracy. The two statements in which Eschief admits shooting the Subway clerk and being accompanied by gang members expose him to liability for murder and

conspiracy. Granted, the last two statements were made after officers invited Eschief to "save" himself because his friends had already snitched on him. But a reasonable person would not confess to shooting another in the head unless he believed it to be true, even if he were cooperating in the hope of a reduced sentence. In all, the hearsay statement were "truly self-inculpatory, rather than merely attempts to shift blame or curry favor." Williamson v. U.S., 512 U.S. 594, 603 (1994).

Finally, the self-inculpatory nature of the statements alleviates any concern over the Confrontation Clause. See Williamson, 512 U.S. at 605 (the very fact that a statement is genuinely self-inculpatory is itself one of the particularized guarantees of trustworthiness that makes a statement admissible under the Confrontation Clause. See also, United States v. Nazemian, 948 F. 2d 522, 532 (9th Cir. 1991).

VIII. Ineffective assistance of counsel (Ricardo)

Ricardo argues that the judge should have granted his motion for the federal court to stay the state court actions in which his lawyer was representing a defendant, because the obligation to try two cases simultaneously rendered counsel ineffective per se. But he cites no authority for the proposition that counsel's obligation to try two cases in different courts during the same overlapping weeks renders counsel ineffective per se, and point to no evidence of ineffectiveness or defective representation in Ricardo's case.

Moreover, the federal judge noted that counsel's responsibilities in the state case were limited to DNA evidence issues, and he was not lead counsel there.

We ordinarily do not decide ineffectiveness of counsel on direct appeal, but leave it for habeas review, and it is not argued in this case, so we intimate no conclusion on whether counsel was ineffective.

Therefore, we reject the ineffective assistance claim without prejudice.

IX. Motion to Stay (Ricardo)

As for whether the federal judge should have stayed the state proceedings, Ricardo cites no authority for the proposition that the federal judge could have done so. Under 28 U.S.C. § 2283, a federal court "may not grant an injunction to stay proceedings, "unless one of three exceptions applies. Ricardo has not argued for applicability of any of the exceptions, and it is hard to see how he could.

X. Evidence of gun possession at time of arrest (Riley Jr.)

Riley Jr. argues that testimony indicating his possession of a gun at the time of his arrest was irrelevant and prejudicial. But the evidence was relevant to the ESC's ongoing conspiracy to acquire and use firearms. See United States v. Spaulding, 588 F. 2d 669 (9th Cir. 1978). Moreover, the evidence probably did not materially affect the

verdict given the other testimony at trial. See United States v. Rubio, 727 F. 2d at 786, 798 (9th Cir. 1983).

XI. Admission of 911 tape (Antone)

Philbert argues that the district court erred in admitting a tape of the 911 call from the Subway clerk in which the victim indicates that he was robbed and shot. We previously affirmed the introduction of the same 911 tape against Arlo Eschief in his trial for the same Subway robbery and murder. See United States v. Eschief, 1997 WL 107754 (9th Cir. 1997) (unpublished disposition). In that case, we found that the tape was probative and not overly emotional.

We find no reason in this case to deviate from our previous findings. Although Antone may have been willing to concede the robbery element of the charge, the parties never actually filed a stipulation to that effect.

Conclusion

The decision of the district court is AFFIRMED with respect to all Defendants and all issues except for Ricardo's ineffective assistance of counsel claim which we REJECT WITHOUT PREJUDICE.

Appendix A

INTERNAL USE ONLY: Proceedings include all events. 97-10372 USA v. Antone
UNITED STATES OF AMERICA
Plaintiff- Appellee
Patrick J. Schneider, Esq. 602-514-7500
Suite 4000
[COR LD NTC aus]
USPX-OFFICE OF THE U.S. ATTORNEY
230 North First Avenue Phoenix, AZ 85025
v.
PHILBERT ANTONE
Defendant-Appellant
Daniel D. Maynard, Esq.602-279-8500
Ste 2300
[COR LD NTC ret]
MAYNARD, MURRAY, CRONIN & O'SULLIVAN
3200 N. Central Ave. Phoenix, AZ 85012

Docket as of October 3, 1998 0:41am NON PUBLIC

INTERNAL USE ONLY: Proceedings include all events. 97-10371 USA v. Briones, Jr.
UNITED STATES OF AMERICA
Plaintiff- Appellee
Patrick J. Schneider, Esq.602-514-7500
Suite 4000
[COR LD NTC aus]
USPX-OFFICE OF THE U.S. ATTORNEY
230 North First Avenue Phoenix, AZ 85025
v.
RILEY BRIONES, JR.
Defendant-Appellant

Appendix A

Charles M. McNulty, Esq. 602-262-4224
Suite 103-316
[COR LD NTC cja]
3003 N. Central Phoenix, AZ 85012

Docket as of October 9, 1998 0:34am NON PUBLIC

INTERNAL USE ONLY: Proceedings include all events. 97-10370 USA v. Briones
UNITED STATES OF AMERICA
Plaintiff- Appellee
Patrick J. Schneider, Esq. 602-514-7500
Suite 4000
[COR LD NTC aus]
USPX-OFFICE OF THE U.S. ATTORNEY
230 North First Avenue Phoenix, AZ 85025
v.
RICARDO BRIONES
Defendant-Appellant
Michael Reeves 602-241-0460
Suite 210
COR LD NTC cja]
45 W. Jefferson Phoenix, AZ 85003

Docket as of October 9, 1998 0:34am NON PUBLIC

INTERNAL USE ONLY: Proceedings include all events. 97-10369 USA v. Briones, SR.
UNITED STATES OF AMERICA
Plaintiff- Appellee
Patrick J. Schneider, Esq. 602-514-7500
Suite 4000

Appendix A

[COR LD NTC aus]
USPX-OFFICE OF THE U.S. ATTORNEY
230 North First Avenue
Phoenix, AZ 85025
v.
RILEY BRIONES SR.
Defendant-Appellant
Tamara D. Brooks, Esq. 602-254-3332
Suite 17
[COR LD NTC cja]
11 W. Jefferson Arcade Phoenix, AZ 85003

Docket as of November 26, 1998 0:32am NON PUBLIC

APPENDIX B-JUDGMENT

FILED MARCH 31, 2003
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
CR 96-464- PHX-RCB
CV 99-2094 PHX-RCB

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

Vs.

Riley Briones, Jr.,
Defendant/Movant

JUDGMENT

This action came on for consideration before the Court, the Hon. Robert C. Broomfield, United States District Judge presiding, and the issues having been duly considered and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that the defendant's Motion to Vacate, Set Aside, or Correct Sentence is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Movant take nothing and the action be, and same hereby is, dismissed.
Dated at Phoenix, Arizona, this 31st day of March, 2003.

Appendix B

RICHARD H. WEARE, Clerk, DCE
By: /s/Taylor Deputy Clerk

cc: USA,
Judgment Book
Defense Counsel
Pretrial Services
U.S. Marshals
Probation

APPENDIX C- ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FILED MARCH 31, 2003
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA

CR 96-464- PHX-RCB
CV 99-2094 PHX-RCB

United States of America,

Respondent,

vs.

Riley Briones, Jr.,

Movant

ORDER

Riley Briones, Jr. is one of three federal prisoners who move to vacate their convictions and sentences under 28 U.S.C. § 2255 based on their leadership or involvement in the crimes committed by themselves or by their street gang called the Eastside Crips "Rolling 30's" on the Salt River Pima-Maricopa Indian Community. Briones, Jr. is a founder of the gang, and drove certain members to and from a Subway restaurant where Arlo Eschief robbed the restaurant and shot to death the clerk who worked there named Brian Patrick Lindsey.

On February 7, 2001, the U.S. Magistrate Judge filed his Report and Recommendation that suggested that this Court deny the § 2255 motion in its entirety. *See* Report and Recommendation

(Doc. 269). Briones, Jr. then filed his Objections. *See* Objections to Magistrate [']s Report and Recommendation in the Entitled Cause (Doc.274). As the following analysis reveals, the Court has thoroughly reviewed the record and agrees with the U.S. Magistrate Judge that relief under § 2255 is not warranted and hence the motion will be denied.

Before proceeding to the analysis of Briones, Jr.'s eight grounds for relief, the Court makes the following two preliminary observations.

First, Briones, Jr.'s constitutional claims for relief under his Sixth Amendment right to the effective assistance of counsel are governed by the two-pronged test under *Strickland v. Washington*, 466 U.S. 668 (1984). See *United States v. Sanchez-Cervantes*, 282 F. 3d 664, 671 (9th Cir. 2002) (holding that "we must" apply *Strickland* to ineffective-assistance-of counsel claims in an appeal from the district court's denial of a motion to vacate under 28 U.S.C. § 2255).

Briones, Jr. must prove both deficient performance ("counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" under an objective, totality-of-the-circumstances standard measured against "prevailing professional norms") and that counsel's deficient performance prejudiced his defense (although a lower threshold than a preponderance-of-the-evidence standard or a more-likely-than-not-standard, the defendant must show that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different" in that the probability is "sufficient to undermine confidence in the outcome"). See *Strickland*, 466 U.S. at 687, 688, 694. The performance-and-prejudice test applies equally to claims on direct review and collateral proceedings. See 466 U.S. at 697-98 ("[s]ince fundamental fairness is the central concern of the writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings" [citation omitted]). Finally, the Court may address either prong, in any order, if its resolution will dispose the claim:

> [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that

> ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result. [466 U.S. at 697].

Second, although Briones, Jr. frames his ineffective-assistance-of-counsel claims as challenges to both his trial and appellate counsel, this Court's conclusion that his trial counsel did not perform constitutionally ineffectively obviates the need to write out the following repetitive verse at the conclusion of each sections: "Because Briones, Jr.'s trial counsel did not perform ineffectively or cause prejudice to Briones, Jr., his appellate counsel's decision not to raise this issue on appeal did not violate the Sixth Amendment right to effective assistance of appellate counsel." See *Turner v. Calderon*, 281 F. 3d 851, 873 (9th Cir.2002) (holding that "[c]laims of ineffective assistance of appellate counsel are reviewed according to the standard announced in *Strickland v. Washington*. To be constitutionally effective, counsel need not appeal every possible question of law" [citations, ellipse, brackets, and internal quotation marks omitted]); *Bailey v. Newland*, 263 F. 3d 1022, 1028-29 (9th Cir. 2001) (reaffirming that Strickland's "two prongs partially overlap when evaluating the performance of appellate counsel. In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. Appellate

counsel will therefore frequently remain above and objective standard on competence (prong one) and have caused her client no prejudice (prong two) for the same reason- because she declined to raise a weak issue" [ellipses omitted]).

The Court will now evaluate Briones, Jr's eight grounds for relief.

Ground I. Ineffective assistance of counsel based on failure to object to the trial court's jury instructions and the prosecution's closing argument which partially directed a verdict on the jurisdictional elements of certain counts.

In his first ground for relief, Briones, Jr. advances two attacks: first his appellate counsel rendered ineffective assistance of counsel by failing to appeal "the fact that the trial judge directed a partial directed verdict on the jurisdictional element" of counts one, three, four, and seven though eleven; second, his trial counsel failed to object to the trial court's jury instruction as well as the prosecution's closing argument when they suggested that the jury should "conclusively assume that Petitioner was Indian, thus relieving the jury of its duty to decide all elements of the indicted offense." [Second] Amended Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (28 U.S.C. § 2255) (Doc. #255) ("Motion") at 4 (A).

Although Briones, Jr. does not identify the counts' alleged jurisdictional flaws, the Court's examination of the Indictment leads it to conclude

that the challenged jurisdictional element must be the location where the alleged crimes occurred: "in the District of Arizona, within the confines of the Salt River Pima-Maricopa Indian Community, Indian Country." But there was no question or argument regarding the location of these two crimes during the trial, and Briones, Jr. offers no reasoning or evidence to challenge the location of where these two crimes occurred. In the absence of argument or evidence to challenge the jury instruction, the Court concludes that counsel did not perform ineffectively on this front.

The trial counsel's failure to object to the jury instruction regarding Briones, Jr.'s status as a Native American Indian also did not amount to constitutionally defective performance because his trial counsel had already stipulated during the trial that Briones, Jr. was, in fact, a "Native American Indian [] as defined in Title 18, United States Code, § 1153.'" RT (05/06/97) at 79:8-80:5. Briones, Jr. offers no additional argument that his attorney's underlying stipulation amounted to ineffective performance.

The Court denies the first ground for relief.

Ground II. The government's failure to disclose all prosecution agreements that it had entered into with Norval Antone and Gilland Fulwilder violated Briones, Jr.'s Fifth-Amendment right to due process of law.

In his second ground, Briones, Jr. alleges that the prosecution failed to disclose its

agreements among two witnesses named Norval Antone and Gilland Fulwilder which ensured that, in exchange for their testimony against him, the government would drop their pending murder charges. *See* Motion at 4 (B); Briones, Jr.'s Reply to Governments' Response to Writ Filed Pursuant to 28 U.S.C. § 2255 ("Reply") (Doc. #267) at 5:10-17 (quoting the respective witnesses' in-court denials to the contrary but observing that "now that the trial is over, and charges against both these individuals have been dropped, the government is asking this [C]ourt to believe despite the fact that there was no 'formal written deal,' that there was also no 'informal gentlemen's agreement' which lead to the charges against these two individuals to be dropped. This is just too big a pill to swallow without a proper evidentiary hearing to discover the real truth of what occurred" [emphasis in original]); *accord* Eli Paul Mazur, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 Duke L.J. 1333, 1336 (2002) ("[r]esearch shows that witnesses are more likely to lie, more likely to cooperate, and more likely to fabricate when agents of the state make implicit rather than explicit promises of leniency. Moreover, the procedural safeguards erected to protect the accused from the dangers of the institutionalized plea agreement are ineffective when a witness merely has a rational expectation of leniency").

The government does not deny that the charges against these two witnesses have been

dropped but reiterates the witnesses' denials regarding any undisclosed leniency-for-testimony agreements. *See* Government's Response to Petition for Writ Pursuant to 28 U.S.C. § 2255 ("Response") (Doc. #243) at 23:17-19. The government also attaches a grief affidavit that denies the existence of any agreements:

> I, Patrick J. Schneider, Assistant U.S. Attorney, do hereby swear and affirm that there were no agreements between the U.S. Attorney Office or the federal government and witnesses Gilland Fulwilder and Norval Antone which were not disclosed to defense counsel in the case of **United States v. Antone, et al.** CR 96-464-PHX-RCB. [Affidavit, attached as final page to the government's Response].

Briones, Jr.'s claim is governed by a confluence of U.S. Supreme Court and Ninth Circuit decisions. The prosecution's suppression of material, exculpatory evidence favorable to an accused violates the constitutional right to due process of law "irrespective of the good faith or bad faith of the prosecution" under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). And when a witness's reliability may determine guilt or innocence, the U.S. Supreme Court has held that a leniency-for-testimony agreement constitutes the type of credibility evidence which must be disclosed to the defense under *Brady*. See *Giglio v. United States*,

405 U.S. 150, 154 (1972); *United States v. Ramirez*, 608 F.2d 1261, 1266 (9th Cir.1979) (citing *Giglio* among cases for proposition that it is "well established that the prosecutor has a duty to disclose any promises of leniency made to a witness testifying at trial since any such agreement is relevant to his or her credibility"); see also *Hill v. Johnson*, 210 F. 3d 481, 485 (5th Cir. 2000) ("[t]hat an accused's constitutional rights are violated when the State withholds material evidence affecting the credibility of witnesses is well-established"). Specifically, a prosecutor's failure to disclose to the defendant that one of its witnesses has been a promised that he would not be prosecuted if he cooperated with the government violates a defendant's constitutional due-process rights. See *Giglio v. United States*, 405 U.S. at 154-55; see also *Killian v. Poole*, 282 F. 3d 1204, 1210 (9th Cir. 2002 (citing *Brady* and *Giglio* among cases for proposition that "[i]f exculpatory or impeachment evidence is not disclosed by the prosecution and prejudice ensues, a defendant is deprived of due process").

That the agreement may have been an informal wink-and-nod understanding makes no difference: every agreement between the government and a witness that exchanges leniency for testimony must be disclosed to the defense. In a case that affirmed a defendant's conviction for failure to actually prove a *Giglio* violation, the Ninth Circuit recognized that even an *implicit* leniency-for-testimony agreement must be

disclosed to the defense:

> We are not unaware of the reality that the Government has ways of indicating to witness's counsel the likely benefits from cooperation without making a bald promises, and that conceivably [the witness's] and his counsel's protestations that the Government made no "promises" while perhaps literally true might have been misleading. The prosecutor has a duty to apprise the court when he or she knows the witness is giving misleading testimony regarding such promises or negotiations.
> [*Ramirez*, 608 F. 2d at 1266 n.9 (citations omitted); *see also Bagley v. Lumpkin*, 798 F. 2d 1297, 1302 (9th Cir. 1986) ("the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor" [quoting *Boone v. Paderick*, 541 F. 2d 447, 451 (4th Cir. 1976)]);

Several other federal courts agree. *See, e.g., Brown v. Wainwright*, 785 F. 2d 1457, 1464-65 (11th Cir. 1986) (rejecting the State's interpretation that *Giglio* forbids only those agreements where the 'promise of leniency' is express; "[c]ertainly *Giglio* does not require that the word 'promise' is a word of are that must be specifically employed. ...The state's argument misconceives the constitutional concerns addressed by *Giglio*. It is a constitution

we deal with, not semantics"); *Zuern v. Tate*, 101 F. Supp. 2d 948,971 (S.D. Ohio 2000) ("[o]f course, the state's obligation under *Brady* is not limited to instances where it has entered into an express agreement with one of its witnesses. For instance, in *Alderman v. Zant*, 22 F. 3d 1541, 1554 (11th Cir. [1994]), cert. denied, 513 U.S. 1061, 115 S. Ct. 673, 130 L.Ed.2d 606 (1994), the Eleventh Circuit noted that the duty to disclosure extends to 'informal understandings,' as well as to instances where the prosecutor has made an express promise to a witness")].

Unfortunately for Briones, Jr., however, he has not alleged sufficient facts to warrant an evidentiary hearing on his claim. Briones, Jr.'s entire ground rests on the raw fact that the two witnesses testified against him and then later the government dropped their pending charges which, as a matter of law, does not amount to the "substantial indicia of a prior agreement" to justify an evidentiary hearing:

> Even if a prior plea bargain has not been clearly established, where there is substantive claim an undisclosed agreement had been reached, *DeMarco v. United States*, 415 U.S. 449, 450, 94 S. Ct. 1185, 39 L.Ed.2d 501 (1974) [(per curium)], requires remanding the case to the district court to conduct an evidentiary hearing in order to determine whether

> a bargain was reached prior to the witness's giving of his testimony. However, the mere fact that the witness was subsequently allowed to plead to a lesser offense in and of itself is not sufficient to warrant a *DeMarco* hearing. In *DeMarco*, the existence of a plea agreement was clear and the remarks of the United States Attorney at the witness's sentencing hearing indicated that the agreement may have been reached prior to the witness's testimony. Appellant has not presented us with any substantial indicia of a prior agreement allowing for a misdemeanor disposition other than [the witness's] actual plea three days after appellant's trial. The transcript of the [witness's] proceedings provided by the appellant does not reveal any evidence of a plea bargain which, if it existed, was required to have been disclosed on the record under Federal Rule of Criminal Procedure 11(e) (2). [*Ramirez*, 608 F. 2d at 1267 citations omitted)].

Like the *Ramirez* court, this Court has not been presented with "any substantial indicia of a prior agreement" among the government and the disputed witnesses. In fact, Briones, Jr.'s raw allegation presents less evidence of an agreement than the *Ramirez* court faced when it denied

remanding the case to the district court for an evidentiary hearing. See *Ramirez*, 608, F. 2d at 1266 n.9 (concluding that "there is no substantive evidence that [an implicit leniency-for-testimony agreement] occurred in the instant case" even though the witness was allowed to plea to a misdemeanor shortly after the defendant's trial and the prosecutor's pre-trial letter to the witness's attorney state that the witness will given the opportunity to plead guilty to certain crimes in exchange for cooperation but that no promises could or would be made; "the record is void of any evidence that an agreement allowing such a disposition had been reached *at the time of the trial* which was not disclosed to the jury" [emphasis added]); *accord DeMarco*, 415 U.S. at 450 (holding that whether a leniency-for-testimony agreement was "made after or before [a defendant's] trial" is "dispositive" in determining whether there has been a *Giglio* violation).

The *Ramirez* holding remains good law in this Circuit and in other Circuits as well. See, *e.g.*, *United States v. Cooper*, 173 F. 3d 1192, 1203 (9th Cir. 1999) (citing *Ramirez* in affirming defendant's conviction; "[a]s the defense established at trial, [the testifying witness's] credibility was shaky at best. He faced potential criminal prosecution in the United States, so it seems unlikely that he would return to testify only because he wanted to tell the truth. This, however, is at most circumstantial evidence of an immunity agreement with [the witness]. A defendant must present more direct

evidence of an agreement to justify reversal on this ground"); *United States v. Molina*, 75 F. 3d 600, 602 (10th Cir. 1996) (citing *Ramirez* in affirming defendant's conviction because "[t]he mere fact that the witnesses were subsequently allowed to plead on favorable terms is not evidence that the plea agreements were secretly reached prior to the witness' testimony and improperly withheld from the defense"); *United States v. Baskes* 649 F.2d 471, 476-77 (7th Cir. 1980) (citing *Ramirez* in affirming defendant's conviction; testifying witnesses' attorney's "hopeful expectation" that his clients' testimony might help them avoid criminal exposure "even when supplemented by evidence that government attorney used language [in communicating with another government attorney] concerning the possibility of granting informal immunity is not sufficient to warrant a new trial under the rationale of *Giglio*. The situation is too equivocal to deem the witnesses' answers false and the government under a duty to correct or qualify them" [citations omitted]).

Finally, counsel for Briones, Jr. and his co-defendants exposed the two witnesses' motivation to testify by vigorously cross-examining them, thus fulfilling a procedural safeguard against false testimony under the Sixth-Amendment Confrontation Clause and the Fifth-Amendment Due Process Clause. See RT (04/18/97) at 10:21-21:9 (Fulwilder's cross-examination by Philbert Antone's counsel); *id.* at 21:14-55:9 (same by Ricardo's counsel); *id.* at 55:14-103:22 (same by

Briones, Jr.'s counsel); *id.* at 110:6-190:7 (same by Briones, Sr.'s counsel); *id.* at 190:19-232:2 (same by Webster's counsel); RT (04/24/97 at 137:13-183:18 (Norval Antone's cross-examination by Philbert Antone's counsel); *id.* at 184:17-222:7 (same by Ricardo's counsel); *id.* at 222:11-270:20 (same by Briones, Jr.'s counsel); RT (04/25/97) at 5:13-37:15 (same by Briones, Sr.'s counsel); *accord Delaware v. Van Ardsall,* 475 U.S. 673, 678-79 (1986) (reaffirming that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination").

The Court denies the second ground for relief.

Ground III. Ineffective assistance of counsel based on failure to refute Detective Auerbach's rendition of Arlo Eschief's out-of-court statements.

In his third ground, Briones, Jr. alleges that his counsel should have refuted Detective Auerbach's rendition of Arlo Eschief's out-of-court statements regarding what happened during the night of the robbery and killing. *See* Motion at 5. The Government counters that Briones, Jr. never explains *how* counsel should have rebutted the testimony or otherwise points to *which* evidence or witness could have countered the testimony. *See* Response at 23:27-24:3.

Briones, Jr.'s failure to specify his charges prevents the Court from granting relief. *See Jones v. Gomez,* 66 F.3d 199, 205 (1995) (affirming

district court's denial of habeas relief because the petitioner's "conclusory suggestions that his trial and state appellate counsel provided ineffective assistance fall far short of stating a valid claim of constitutional violation").

The Court denies the third ground for relief.

Ground IV: The prosecution's introduction of Arlo Eschief's out-of-court statements violated the Sixth Amendment's Confrontation Clause, as evinced through a superseding change in the law.

Briones, Jr. alleges that, irrespective of his counsel's performance as measured under ground three, the prosecution's introduction of Arlo Eschief's out-of-court statements- through the in-court rendition by Police Detective Karl Auerbach, over the defendant's pre-trial and contemporaneous objections- regarding what happened during the night of the gang's Subway robbery and killing violated the Sixth Amendment's Confrontation Clause. *See* Motion at 5(d); *accord* U.S. Const. amend.VI ("In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him..."). Explicitly recognizing that the Ninth Circuit already resolved this ground against him on direct review, he states that a superceding change in law has occurred. *See* Motion at 5 (d).

Appendix C

Ground IV: The prosecution's introduction of Arlo Eschief's out-of-court statements violated the Sixth Amendment's Confrontation Clause, as evinced through a superseding change in the law.

The Government contends that no change in law has occurred, claiming that the original case on which the Ninth Circuit relied in rejecting Briones, Jr.'s appeal has not been altered. *See* Response at 24:4-12 ("[s]hephardization of [*Williamson v. United States*, 512 U.S. 594(1994)] shows that this case has not been overturned or reversed").

Appendix C

Although Briones, Jr. does not identify the change in the law, this Court's research has disclosed that the movant is most likely referring to the U.S. Supreme Court's plurality opinion in *Lilly v. Virginia* (1999) 527 U.S. 116.[1]

---

[1] The *Lilly* case involved three people- the defendant, his brother named Mark, and the brother's friend- who were arrested at the end of a two-day crime spree that involved stolen liquor and a homicide and who the police took into separate custody and told Mark that "he would be charged with armed robbery and that, unless he broke 'family ties,' petitioner 'may be dragging you right in to a life sentence.'" Mark admitted that he stole alcohol but asserted that the defendant and the friend were the ones that stole the guns and that the defendant "masterminded" the robberies and shot and killed the person. Although the Virginia Supreme Court upheld the trial court's decision to admit Mark's tape-recorded statements to the police because, in light of the brother's invocation of his privilege against self-incrimination, the Confrontation Clause was satisfied for three reasons (Mark's statement fell within a firmly rooted exception to the hearsay rule as declarations against penal interest, the statements were reliable because Mark knew that he was implicating himself as a participant in numerous crimes, and because other evidence at trial corroborated Mark's statements), the U.S. Supreme Court reversed the decision.

Although Justice Scalia concurred separately and found that the prosecution's introduction of Mark's tape-recorded statements during a custodial interrogation in which he stated that the defendant committed the charged crime of murder without making Mark available for cross-examination presented a "paradigmatic Confrontation Clause violation," Justice Stevens led a four-Justice plurality which parsed out *how* the Confrontation Clause violation emerged.

Appendix C

The plurality reaffirmed that labeling a statement as being a declaration against penal interest "defines too large a class for meaningful Confrontation Clause analysis" and categorized the case's fact pattern as falling into the separate subcategory of "evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant." 527 U.S. at 127. Because the statements of a nontestifying accomplice's confession are "inherently unreliable" "under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Id.* At 127 131-32 (internal quotation marks omitted), *citing Lee v. Illinois*, 476 at 541).

The admission of the statements can survive Confrontation Clause scrutiny under one of two conditions. First, the statements may be admissible as a "firmly rooted" hearsay rule exception, but the plurality "explicit[ly] concluded that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence" and thus concluded that "it simply means that the government must satisfy the second prong of the *Ohio v. Roberts*, 448 U.S. 56 (1980) test in order to introduce such statements" which is that the circumstances surrounding the statements bore "particularized guarantees of trustworthiness" such that cross-examination would be of marginal utility.

Appendix C

The plurality found that Mark's statements lacked the required "particular guarantees of trustworthiness" for several reasons. Initially, the government was involved in the statements' production and the statements described past events without being subject to adversarial testing. Additionally, that Mark knew that he was exposing himself to criminal liability "merely restates the fact that portions of his statements were technically against penal interest" and those statements remain constitutionally suspect under *Williamson* "insofar as the inculpate other persons." *See* 527 U.S. at 138-39. Finally, the plurality "squarely rejected" the proposition that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness" because "[t]o be admissible under the Confrontation clause... hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* (some internal quotation marks omitted). The high court remanded the case to the Virginia Supreme Court for a harmless-error analysis of the Confrontation Clause violation. *See id.* 140.

A. Factual background: Detective Auerbach testifies on Arlo Eschief's statements

About one year after the Subway robbery and murder of the clerk there named Brian Patrick Lindsey, Detective Auerbach and a colleague went to Arlo Eschief's home to ask him questions about the incident. The detectives went on two occasions: first on April 24, 1995 and then, after following up on some leads that Eschief provided, again five days later on April 30, 1995.

Appendix C

Detective Auerbach's trial testimony can be found in the Reporter's Transcript from May 5, 1997 at 20:19-27:2. Regarding the first meeting with Eschief on Eschief's front porch, Detective Auerbach testified that Eschief told him the following three statements:

1) Eschief said had he had "hung around" with Briones, Jr., as well as co-defendants Ricardo, PJ Antone, and John Webster in May 1994.
2) Eschief said that Eschief possessed and owned guns around May 1994.
3) Eschief said that Eschief purchased a gun from PJ Antone and his girlfriend got rid of that particular gun in Summer of 1994.

After the detectives found the gun, they submitted the gun for finger prints. This gun was later identified as the same gun produced at trial regarding the Subway crime, and ballistic testing matched the bullets from the Subway clerk's dead body.

On April 30, 1995, the police detectives returned to Eschief's home and spoke with him in a shaded area near his house. After listening to the detectives read to him their pre-written statement that urged Eschief to "save" himself, Eschief purportedly told the detectives the following

statements (rendered in court through the testimony of Detective Auerbach's testimony:

1) Eschief admitted his involvement in the Subway incident and admitted that he shot the clerk.

2) Eschief stated that they were driven to the Subway Restaurant by Riley Briones, Jr. driving his car, and thereby once arriving at the Subway Restaurant, parked several spaces south of the restaurant.

3) Eschief stated Riley Briones, Jr. remained seated in the car while Eschief, John Webster, and PJ Antone went into the restaurant.

4) Eschief stated that they were all similarly dressed and described gang-like clothes.

B. Legal analysis: the three reasons why the Court rejects the claim.

There are three reasons why this Court rejects the claim. First, the U.S. Supreme Court issued the *Lilly* decision over two months after Briones, Jr.'s case had become final: although it is unclear whether Briones, Jr. himself petitioned the U.S. Supreme Court for a writ of certiorari, the high court denied review from the Ninth Circuit's decision that involved himself, Briones, Sr., and Ricardo Briones on April 5, 1999,[2] and the high court decided *Lilly* on June 10, 1999. Before *Lilly*, the U.S. Supreme Court had not so distinctly

---

[2] *See* 526 U.S. 1056 (Apr. 5, 1999).

fleshed out its Confrontation Clause jurisprudence; the Supreme Court's then-most-recent decision on the matter- *Williamson v. United States*, 512 U.S. 594 (1994)- limited itself to the declaration-against-interest hearsay exception under Federal Rule of Evidence 804(b)(3),[3] and that decision's Confrontation Clause discussion occurred in a concurrence where, joined by Justice Scalia, Justice O'Connor reasoned that a truly self-inculpatory statement that is admissible under Rule 804(b)(3) is itself a "particularized guarantee of trustworthiness" that may make the statement survive a Confrontation Clause challenge.[4] In fact, the parties in this case argued the matter under Federal Rule of Evidence 804 (b) (3), and only treated the Confrontation Clause matter in a few sentences to support their more-underlying rule-based contentions[5] The Court recognized the nature

---

[3] *See Williamson*, 512 U.S. at 605 ("[i]n light of this disposition [under Rule 804(b)(3)], we need not address Williamson's claim that the statements were also made inadmissible by the Confrontation Clause..." [*citing through* "see generally" signal *White v. Illinois*, 502 U.S. 346 (1992)]); *accord Lilly*, 527 U.S. at 132-33 (plurality opinion) (recognizing that the Court decided *Williamson* under Federal Rules of Evidence "without reaching the Confrontation Clause issue..." [footnote omitted]).

[4] *See* n.7, infra.

[5] *Compare* Government's Motion in Limine to Introduce Statements of Arlo Eschief (Doc.28) at 10:4-10 (arguing that "[e]ven assuming that corroborating evidence is required to establish the 'trustworthiness' of statements sought to be introduced, a number of statements made by Arlo Eschief to Detectives Auerbach and Arvisu are

admissible under Rule 804(b)(3) of the Federal Rules of Evidence as statements against interest, or under Rule 804(b)(5) under the catch-all provision of the Rule") *and* Government's Motion for Reconsideration of Motion in Limine to Introduce Statements (Doc.45) at 2:26-3:11 (arguing that "[t]he [C]ourt misinterpreted the government's request. The government does not seek to introduce the totality of Arlo Eschief's statements. Rather, the government provides all of the statements so that the court can review the context in which the statements were made. The government requests that some of those statements made in that context be admitted as exceptions to the hearsay rule under Rule 804(b)(3) as statements against interest under the analysis set forth in Williamson v. United States, 114 S. Ct. 2431 (1994), as statements pursuant to Rule 804(b)(5) as statements not specifically covered by any of the other enumerated exceptions but which have equivalent circumstantial guarantees of trustworthiness") *with* Philbert Antone's Response to the Government's Motion In Limine to Introduce Statements of Arlo Eschief (Doc.38) at 5:19-23 (observing that "[b]oth sides rely upon Williamson v. United States in support of their contradictory positions about the applicability of Rule 804(b)(3) to testimony concerning the statements of Eschief" [citation omitted]) and Response to Motion in Limine Re: Eschief Statements (Doc.31) (noting that "even though a statement may be admissible pursuant to the Rules of Evidence, it does not necessarily mean that there has been compliance with the [C]onfrontation [C]lause of the Sixth Amendment to the U.S. Constitution" in that "[t]here must be a finding of adequate indicia of reliability for the statement in order to satisfy Constitutional mandates" but not arguing which statements transgress the Constitution and instead representing to the Court that "Defendant Webster requests that the [C]ourt make the above-described findings of fact and law for each statement of Arlo Eschief that the government seeks to introduce at trial of the above-captioned case in order to determine the admissibility of said statements")

of the parties' arguments and resolved the government's *in limine* motion under that rubric.[6]

Additionally, the Ninth Circuit itself affirmed this Court's decision to permit Detective Auerbach's statements under *Williamson*, the same case that the parties argued before this Court.[7]

---

[6] *See* Order (Doc.39) at 1:18-20 (this Court introducing its *in limine* ruling by stating that the defendants were "relying primarily upon *Williamson v. United States" to argue against the controverted statement 'admissibility" [citation omitted]; Order (Doc.52 at1:19-22 (this Court . . introducing its reconsideration ruling of the prior Order by noting that "[s]pecifically, plaintiff [United States] now articulates reasons why certain statements made by Eschief are self-inculpatory under Williamson v. Unites States" [citation omitted].*

[7] When the Ninth Circuit resolved Briones, Jr.'s appeal, it cited *Williamson in concluding that the self-inculpatory nature of Eschief's statements "alleviates any concern over the Confrontation Clause." Memorandum at 7. The cited portion of* Williamson *was penned by Justice O'Connor and was joined by solely by Justice Scalia. See Williamson*, 512 U.S. at 596, 605. Only in the next sentence did Justice O'Connor write the following language (upon which the Ninth Circuit relied in rejecting Briones, Jr.'s appeal): "We note, however, that the very fact that a statement is genuinely self-inculpatory- which our reading of Rule 804(b)(3) requires-is itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause." *Id.* (*citing Lee v.Illinois*, 476 U.S. 530, 543-45 (1986). The Ninth Circuit buttressed its *Williamson* reliance by citing to *United States v. Nazemian* holding- that an unavailable witness's out-of-court statements did not violate the Confrontation Clause because "his statements bore adequate indicia of reliability"-

Second, to whatever extent *Lilly* may constitute a new rule of criminal procedure under *Teague v. Lane*,[8] it would not be available to Briones, Jr. on collateral review except under two restrictive exceptions that do not apply (both because *Lilly* did not establish that certain conduct cannot be criminalized and because the plurality opinion did not apply (both because *Lilly* did not establish that certain conduct cannot be criminalized and because the plurality opinion did not require the observance of a fairness safeguard that is implicit in the concept of ordered liberty).

---

hinged on the presence of "corroborating circumstances" that supported the declarant's out-of-court statement. *See Nazemian*, 948 F.2d at 531-32 (declining to resolve the firmly-rooted-hearsay-exception debate because "[m]ost importantly, other evidence and testimony at trial corroborates" the unavailable declarant's statement). Reliance on corroborating evidence to survive *Confrontation Clause* review was "squarely rejected" by the *Lilly* plurality. See Lilly, 527 U.S. at 137-38 (*citing Idaho v. Wright*, 497 U.S. 805, 822 (1990)).

[8] In the words of the Tenth Circuit when that court vacated a defendant's conviction because the conviction was not a harmless violation of the Confrontation Clause, "after the Supreme Court's decision in *Lilly*, it is no longer clear whether considering the degree to which a statement is against penal interest is even permissible..." *United States v. Gomez*, 191 F.3d 1214, 1223 (10th Cir. 1999); but see *Hill v. Hofbauer*, 195 F. Supp.2d 871, 880 n.6 (E D. Mich. 2001) ("*Lilly* did not announce a new rule of criminal procedure benefitting defendants in criminal cases. Rather *Lilly* declined to announce a rule at the behest of the state thereby leaving a defendant's rights under the Confrontation Clause as they were"); *Sanders v. Moore*, 156 F. Supp. 2d 1301, 1316 (M.D. Florida 2001) (same).

Third, even if Briones, Jr.'s Confrontation Clause rights were violated (without so concluding) by the introduction of Eschief's out-of-court statements through the in-court rendition by Detective Auerbach's statements if Eschief's statements lacked the required "particularized guarantees of trustworthiness" to admit his out-of-court statements without subjecting them to the crucible of cross-examination, the Court concludes that any error was harmless[9]

The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

---

[9] Accord *Lilly, 527 U.S. at 139-40; Harrington v. California, 395 U.S. 250, 253-54 (1969) (applying harmless-error review to Confrontation Clause error regarding the improper admission of non-testifying co-defendants' confessions; confirming that Confrontation Clause violations are susceptible to harmless-error analysis for both state and federal convictions); Hernandez v. Small, 282 F. 3d 1132, 1144 (9th Cir. 2002) ("[a] Confrontation Clause violation is subject to harmless error analysis").*

otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684. In the Confrontation Clause context, however, the harmlessness must be "determined on the basis of the remaining evidence" in the case, and "cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation" because "such an inquiry would obviously involve pure speculation..." *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988).

Here, the Court is confident that the Confrontation Clause violation was harmless beyond a reasonable doubt. Beginning with the first factor- the importance of Detective Auerbach's in-court rendition of Arlo Eschief's out-of-court statements to the prosecution's case-the Court acknowledges that this factor slightly favors Briones, Jr.. The only person testifying at trial who actually placed Briones, Jr. at the scene of the Subway crime was John Webster, a witness who entered into a plea agreement with the government. Although Webster's testimony is viewed with greater caution than that of other witnesses, he remained subject to cross-examination. That the actual trigger-puller himself confessed to a detective that Briones, Jr. both drove him to the crime and drove him away presents very powerful evidence for the prosecution. For the same reason, the second factor- the cumulative nature of the testimony- also slightly favors Briones, Jr.,

given that only informant John Webster could physically identify Briones, Jr. as the driver.

The third factor, however, favors the government, as there was strong evidence which corroborated Detective Auerbach's testimony. First, the jury was perfectly entitled to ultimately credit the testimony of John Webster, who testified that the group drove to the Subway restaurant in Briones, Jr.'s car and that Briones, Jr. was the one driving the car. *See* RT (04/29/02) at 66:3-67:7. Webster described who was in the car, who sat where, and even detailed the route that the group took to the Subway restaurant. *See id.* at 66:12-67:11. Webster also testified that as he got into the car, "Riley, Jr. told me there was always going to be a time that I was going to be tested, and I wasn't sure if it was going to be for real or if I was just being tested." *Id.* at 66:20-25. Webster further testified that Briones, Jr. remained in the car when the rest of them went into the Subway restaurant and that Eschief returned to the car and spoke to Briones, Jr. before heading back into the restaurant to kill the clerk. *See id.* at 72:23-73:6 and 75:14-22. Briones, Jr. also became "mad" at Webster for *running* out of the restaurant because "it looks obvious, like something happened." RT (04/29/02 at 80:25-81:5. As Briones, Jr. drove the group away after the killing, Briones, Jr. suggested that Nick Pablo retrieve the rifle in the car's backseat so that they could shoot and kill the maintenance worker who glanced at the group as they entered the restaurant. *See id.* at 81:24-82:13.

The next day, Briones, Jr. told Webster "just to keep quiet, and if anybody asked where I was last night, just to say I was home doing something". *Id.* at 85:10-13.

Although the defendants could not locate the maintenance worker who witnessed the incident in order to silence him, the government later located and called this worker- Mr. Ivan Johnson- as a witness. Johnson testified that the car to enter the Subway restaurant were four Native American teenagers. And witness Todd McEvers, who worked at the Warehouse store near the Subway restaurant, testified that he stood outside of the store smoking a cigarette and noticed a car parked halfway between his store and the Subway restaurant and saw the car exit the parking lot as well. Five weeks after the Subway robbery and killing McEvers saw a car which looked like the car that he spotted in the parking lot the night of the Subway incident; McEvers wrote down the license-plate number, gave it to the police, and the car came back registered to Riley Briones, Jr..

The fourth factor also favors the government, as this Court permitted full cross-examination of Detective Auerbach; Briones, Jr. has not alerted this Court to an improper restraint on his attorney's cross-examination.

Finally, the fifth factor favors the government as well, as the overall strength of the government's case points to Briones, Jr.s' involvement in the Subway robbery, especially his

violent threats and actions in seeking to prevent other gang members from discovering any details of the Subway incident.

Although the corroborating evidence of Briones, Jr.'s involvement in the Subway robbery and killing in no way increases the trustworthiness of Eschief's out-of-court statements or otherwise contributes to the statement' "particularized guarantees of trustworthiness" to excuse cross-examination in the absence of a well-established hearsay exception, the substantial corroborating evidence convinces this Court that the Confrontation Clause violation in this case was harmless beyond a reasonable doubt. *Accord Idaho v. Wright*, 497 U.S. at 823 ("[i]n short, the use of corroborating evidence to support a hearsay statement's 'particularized guarantees of trustworthiness' would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. Indeed, although a plurality of the Court in *Dutton v. Evans* looked to corroborating evidence as one of four factors in determining whether a particular hearsay statement possessed sufficient indicia of reliability, see 400 U.S., at 88, 91 S. Ct., at 219, we think the presence of corroborating evidence more appropriately indicates that any error in admitting the statement

might be harmless, rather than that any basis exists for presuming the declarant to be trustworthy" [footnote omitted]).

The fourth ground for relief is denied.

Ground V. Ineffective assistance of counsel based on counsel's failure to move to suppress testimony from "bribed" witnesses.

In his fifth ground, Briones, Jr. asserts that the government's explicit offer of leniency in exchange for testimony from certain witnesses (apparently John Webster) constitutes illegal bribery under 18 U.S.C. § 201 (c)(2) (establishing up to two years' imprisonment for "[w]hoever... gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court... authorized by the laws of the United States to hear evidence or take testimony..."). *See* Motion at 7. Although a three-Judge panel of the Tenth Circuit championed this interpretation in *United States v. Singleton*, 144 F.3d 1343, 1347-48 (10th Cir. 1998), the full Tenth Circuit vacated the panel's opinion and rejected the notion that a government agent's leniency-for-testimony agreement amounts to a "bribe". See *United States v. Singleton*, 165 F.3d 1297, 1298-1302 (10th Cir. 1999) (en banc) (holding that the statute's word "whoever" does not include government agents acting withing the scope of their

authority to exercise the government's prosecutorial powers, given the absence of clear language evincing Congress' intent to overturn such "ingrained aspect of American legal culture" as leniency for testimony). The Ninth Circuit has rejected the argument as well, discerning "no merit" in the claim and observing that the contention has been "firmly rejected" by other Courts of Appeals. *United States v. Mattarolo,* 209 F. 3d 1153, 1160 (9th Cir. 2000); *see also United States v. Smith*, 196 F. 3d 1034, 1038 (9th Cir. 1999) (joining "every circuit that has considered it" in rejecting defendant's Singleton claim).

Briones, Jr.'s contention that the U.S. Constitution and several Senate-ratified international treaties outlaw bribery (*see* Reply at 9:1-12:8) similarly fails to persuade this Court to grant relief, as the Ninth Circuit has rejected the fundamental premise that a prosecutor's offer of leniency in exchange for truthful testimony constitutes a bribe in the first place.

The Court also notes that it cautioned the jury regarding Webster's testimony on three occasions. The first occurred when Webster actually pleaded guilty to count 17 and the second time occurred when the Court acquiesced to Briones, Jr.'s co- defendant Briones, Sr.'s counsel's request that the Court should re-caution the jury immediately before John Webster actually took the stand a week later:

> I previously told you- I believe it was about a week ago- that Mr.

Webster had entered a plea of guilty to Count 17 of the indictment, the RICO charge, and in exchange, the government will ask that I dismiss the other charges against Mr. Webster, and as I told you, as a part of that plea agreement, Mr. Webster will be called for the government to testify, and that's going to occur today[¶] Mr. Websters' guilty plea is not evidence against any of the other defendants, and you may consider it only in determining Mr. Webster's believability. You should examine his testimony, you should consider the extent to which you [sic] may have been influenced by his plea agreement with the government [¶] Although the defendants are being tried together, you must give separate consideration for each defendant. In doing so, you must determine what the evidence in the case proves with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant.

Appendix C

> The fact that Mr. Webster has pleaded guilty should not influence in any way your verdict as to any other defendant.

[RT (04/29/97 at 44:7-45:3].

The Court's third warning took place in the form of reading to the jury an instruction that complies with the Ninth Circuit's Model Criminal Jury Instructions by cautioning the jury to carefully scrutinize any compensated testimony:

> [S]ome [accomplices] received benefits, compensation or favored treatment in connection with this case. You should consider such testimony with greater caution than that of an ordinary witness, and you should consider the extent to which it may have been influenced by the receipt of those benefits, compensation or favored treatment.
>
> [RT (05/08/97 at 50:2-11; *accord* Comm. On Model Criminal Jury Instructions Within the Ninth Circuit, Manual of Model Criminal Jury Instructions 4.9 ("Testimony of Witness under Grant of Immunity"), 4.10 ("Testimony of Witness Receiving Benefits"), 4.11 ("Testimony of Accomplice") (2000) (each model instruction containing language that the jury should consider the testimony

"with greater caution than that of other witness")].

The above-quoted instructions served the "essential procedural function[]" of "reinforc[ing] the defense's cross-examination by attacking the generalized trustworthiness of accomplice testimony." Mazur, 51 Duke L.J. at 1354.

The Court denies the fifth ground for relief.

Ground VI: Ineffective assistance of counsel on counsel's failure to request a *James* hearing or a hearing under Federal Rule of Evidence 104.

In his sixth ground, Briones, Jr. faults his counsel on two fronts: first, counsel failed to request a court-based determination of certain persons' qualifications to be a witness and the admissibility of their testimony (under Federal Rule of Evidence 104); second, counsel should have requested what is called a *James* hearing to assess whether substantial independent evidence of a conspiracy exists which would justify admission of an alleged co-conspirator's statement into evidence under FRE 801 (d)(2)(E). *See* Motion at 7.

Addressing the *James* argument first, the Court observes that the district court's authority to conduct a *"James hearing"* stems from a Fifth Circuit decision which held that a co-conspirator's statements are admissible FRE 801 (d)(2)(E) hearsay exception only if substantial independent evidence of a conspiracy exists. See

United States v. James, 590 F.2d 575, 581 (5th Cir. 1991) (en banc), *abrogated on other grounds as recognized in the United States v. Fragoso*, 978 F.2d 896, 900 (5th Cir. 1992). As one of the potential methods by which a district court can determine the admissibility of the statements, the court can conduct an outside-of-the-jury's-presence hearing known as a *James* hearing. See *United States v. Williams*, 264 F.3d 561, 576 (5th Cir. 2001).

The *James* court recognized, however, "that if the district court 'determines it is not reasonably practical to require a showing to be made before admitting the evidence, [it] may admit the statement subject to being connected up'" through a subsequent final determination of the statement's admissibility. See *United States v. Baltas*, 236, F.3d 17, 35 (1st Cir. 2001) (footnote omitted; brackets added by the *Baltas* court). The district court retains discretion over how to conduct the admissibility determination. See *Williams*, 264 F.3d at 576.

In this case, this Court considered and rejected Briones, Jr.'s co-defendant Briones, Sr.'s request for a *James* hearing. *See* Motion for *James* Hearing (Doc. #74); RT (04/29/97) at 27:12-42:13. Because Briones, Jr.'s motion to vacate does not disclose the testimony which this Court allegedly improperly admitted, this Court can only assume that he hinges his claim on the same statements attacked by Briones, Sr. when his counsel requested a *James* hearing. In light of this assumption, no constitutionally cognizable

prejudice could have arisen from Briones, Jr.'s counsel's failure to request a *James* hearing on the same matter advanced by his co-counsel.

Turning to the second argument regarding FRE 104, Briones, Jr. cites Ninth Circuit case law which holds that a trial judge's ability to consider the co-conspirator's out-of-court statement in assessing the statement's *admissibility* under FRE 104 does not affect the inherent *unreliability* of the statement, which in turn requires that the co-conspirator's statement that implicates the defendant in the alleged conspiracy must be corroborated by "fairly incriminating evidence." *See* Rely at 12:18-26, *quoting United States v. Silverman*, 861 F.2d 571, 577-78 (9th Cir. 1988). Briones, Jr.'s ground for relief apparently transforms into an argument that had his trial counsel asked for a hearing for Briones, Jr. alone, the trial result would have been different from him because Eschief's statements "completely ex[]onerated Briones[,Jr.] from any involvement in the robbery and murder at the Subway Restaurant." Reply at 12:27-13:6.

This argument falls flat, as Eschief's statement *inculpated* Briones, Jr. in the Subway crime by stating that it was Briones, Jr. who drove the gang members to the restaurant, parked to the car several spaces south of the restaurant, and then drove the group away after Eschief shot the clerk in the face. Under no possible reading could Detective Auerbach's in-court rendition of Arlo Eschief's out-of-court statements vindicate or exculpate Briones,

Jr.. In fact, that Detective Auerbach's rendition of Eschief's statements *inculpate* Briones, Jr. in the Subway crime is the very reason that he retains standing to raise the Confrontation Clause challenge under grounds three and four.

Ground VII: Ineffective assistance of counsel based on failure to request that the District Court make a determination that the government's expert witness comply with Federal Rules of Evidence 702, 703, and 104 and failure of the District Court to screen the expert witnesses for their expert opinions.

According to Briones, Jr.'s Reply, his seventh ground "relates to the fact that the district court did not conduct an extensive voir dire to assess the basis for and relevance and reliability of the ATF 'expert' on destructive devices." Reply at 13:17-20. Citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), Briones, Jr. maintains that the ATF expert merely "vouched" for the contents of the "evidence transmittal form" and other reports, given that the government failed to establish "a truly independent 'expert opinion.'" Reply at 13:20-14:3.

This ground fails because the ATF expert named Jerry Andrew Taylor detailed on the stand his 17 years of experience as an Explosives Enforcement Officer for the ATF and his 30 years of experience in the area of explosives and incendiary devices. *See* RT (04/16/97) at 188:10-190:19. Additionally, Briones, Jr.'s attorney brought out on

cross-examination that Taylor did not "examine any evidentiary items in connection with this case." *Id.* at 194:7-10. He also brought out that Taylor's own report read that "[t]he evidence could not be analyzed for the presence of ignitable liquids with any meaningful conclusion." *Id.* at 196:11-17. Briones, Jr. has not established his counsel's deficient performance or constitutionally recognizable prejudice here. The Court denies the seventh ground for relief.

Ground VIII: Ineffective assistance of counsel based on failure to file a pre-trial motion challenging counts eleven, fifteen, and seventeen as void for vagueness.

In his final ground for relief, Briones, Jr. argues that his trial counsel rendered ineffective assistance in failing to file a pre-trial motion to challenge counts, 11, 15, and 17 on void-for-vagueness grounds. *See* Motion to Vacate at 8.

The government did not indict Briones, Jr. in counts 15 or 17 so he lacks standing to challenge their specificity. As for the specificity on count 11 (assault with a dangerous weapon- 18 U.S.C.§ 113(a)(3) and 2), the indictment provides a date, location, the victim's name, and the type of dangerous weapon (a rifle), and the applicable federal statutes. *See* Indictment at 9:9-15. As a matter of law, the federal assault statute under which the government indicted Ricardo is not unconstitutionally vague. *See United States v. Dupree*, 544 F. 2d 1050, 1052 (9th Cir. 1976) (per

curium) (reversing district court's void-for-vagueness-based dismissal of federal-assault indictment under 18 U.S.C § 113; "[u]se of this common-law definition of assault will render 18 U.S.C. § 113 (c) sufficiently certain to give a person of ordinary intelligence fair notice that his contemplated activity is forbidden"), *reaffirmed in United States v. Spencer*, 839 F.2d 1341, 1343-44 (9th Cir. 1988) (citing *Dupree* for statement that "[t]his court has held that the common-law meaning of a common-law term used in a federal criminal statute is a source of statutory precision in determining whether a statute is impermissibly indefinite. A statute is not impermissibly indefinite if it gives a person of ordinary intelligence fair notice that his contemplated activity is forbidden").

Briones, Jr.'s counsel did not perform defectively in failing to file a pre-trial challenge to count 11 because the count is not unconstitutionally vague. The Court denies the eighth ground for relief.

CONCLUSION AND ORDER

IT IS ORDERED that, for the foregoing reasons, the Court denies Riley Briones, Jr.'s motion to vacate in its entirety.

DATED this 31st day of March, 2003

/s/ Robert C. Broomfield

Senior United States District Judge

APPENDIX D-JUDGMENT
FILED MARCH 31, 2003
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
CR 96-464- PHX-RCB
CV 99-2054 PHX-RCB

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

Vs.

Ricardo Briones,
Defendant/Movant.

JUDGMENT

This action came on for consideration before the Court, the Hon. Robert C. Broomfield, United States District Judge presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the defendant's Motion to Vacate, Set Aside, or Correct Sentence is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Movant take nothing and the action be, and same hereby is, dismissed.

Dated at Phoenix, Arizona, this 31st day of March, 2003.

RICHARD H. WEARE, Clerk, DCE
By: /s/ Taylor Deputy Clerk

cc: USA, Judgment Book, Defense Counsel, Pretrial Services, U.S. Marshals, Probation

APPENDIX E- ORDER

FILED ON MARCH 31, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CR-96-00464-RCB
CIV-99-02095-RCB
District of Arizona,
Phoenix

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
V.
RICARDO BRIONES,
Defendant-Appellant

ORDER

Ricardo Briones is one of three prisoners who move to vacate their convictions and sentences under 28 U.S.C.§ 2255 based on their leadership or involvement in thc violent crimes committed by themselves or by their street gang called the Eastside Crips "Rolling 30's" on the Salt River Pima Maricopa Indian Community.

Although the fifteen-year old Ricardo Transcript ("RT") (07/28/97) at 49:9-18 (this Court reducing Ricardo's enhancement from four to three under the United States Sentencing Guidelines); *id.* at 82:9-13 (this Court acknowledging that Ricardo "was not involved in an actual murder" but

nonetheless concluding that Ricardo was "heavily involved in this gang").

On February 7, 2001, the U.S. Magistrate Judge filed his Report and Recommendation that suggested that this Court deny the motion in its entirety. *See* Report and Recommendation (Doc. 268). Ricardo then filed his Objections, arguing that the Report and Recommendation's grouping of certain claims and brief analysis would render Ricardo "in a position where he has not received adequate or effective collateral review." Movant's Objection to "Report and Recommendation" by Magistrate [hereinafter Objections] (Doc.275) at 5:2-13. As the following analysis reveals, the Court has thoroughly reviewed the record and nonetheless agrees with the U.S. Magistrate the relief under § 2255 is not warranted and hence the motion will be denied.

Before proceeding to the analysis of Ricardo's nineteen grounds for relief, the Court makes the following three preliminary observations.

First, this Order refers to Mr. Ricardo Briones as "Ricardo" in order to distinguish him from his co-defendants (his brother Riley Briones, Jr. and his father Riley Briones, Sr.), and the Court implies no disrespect in referring to Mr. Ricardo Briones by his first name as a matter of administrative convenience only. *See, e.g., Bond v. Walker*, 68 F. Supp. 2d 287, 289 n.1 (S.D. New York 1999) (adopting Magistrate Judge's Report and

Recommendation which employed a similar approach).

Second, Ricardo's constitutional claims for relief under his Sixth Amendment right to the effective assistance of counsel are governed by the two-pronged test under *Strickland v. Washington*, 466 U.S. 668 (1984). *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002) (holding that "we must" apply *Strickland* to ineffective-assistance-of-counsel claims in an appeal from the district court's denial of a motion to vacate under 28 U.S.C. § 2255).

Ricardo must prove *both* deficient performance ("counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" under and objective, totality-of-the-circumstances standard measured against "prevailing professional norms") and that counsel's deficient performance prejudiced his defense (although a lower threshold than a preponderance-of-the-evidence standard or a more-likely-than-not standard, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" in that the probability is "sufficient to undermine confidence in the outcome"). *See Strickland*, 466 U.S. at 687, 688, 694. The performance-and-prejudice test applies equally to claims on direct review and collateral proceedings. *See* 466 U.S. at 697-98 ("[s]ince fundamental fairness is the central concern of the

writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings" [citation omitted]). Finally, the Court may address either prong, in any order, if its resolution will dispose the claim:

> [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result. [466 U.S. at 697].

Third, although Ricardo frames his ineffective-assistance-of-counsel claims as challenges to both his trial and appellate counsel, this Court's conclusion that his trial counsel did not

perform constitutionally ineffectively obviates the need to write out the following repetitive verse at the conclusion of each section: "Because Ricardo's trial counsel did not perform ineffectively or cause prejudice to Ricardo, his appellate counsel's decision not to raise this issue on appeal did not violate the Sixth Amendment right to effective assistance of appellate counsel." *See Turner v. Calderon*, 281 F.3d 851, 873 (9th Cir. 2002) (holding that "[c]laims of ineffective assistance of appellate counsel are reviewed according to the standard announced in *Strickland v. Washington*. To be constitutionally effective, counsel need not appeal every possible question of law" [citations, ellipses, brackets, and internal quotation marks omitted]); *Bailey v. Newland*, 263 F.3d 1022, 1028-29 (9th Cir. 2001) (reaffirming that *Strickland's* "two prongs partially overlap when evaluating the performance of appellate counsel. In many instances, appellate counsel will fail to raise an issue because she foresees little to no likelihood of success on that issue; indeed, the weeding out of the weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason- because she declined to raise a week issue" [ellipses omitted]).

The Court will now evaluate Ricardo's nineteen grounds for relief.

Appendix E

Ground I: Ineffective assistance of counsel based on failure to object to the trial court's jury instructions and the prosecution's closing argument which partially directed a verdict on the jurisdictional elements of certain counts.

In his first ground for relief, Ricardo advances two attacks: first, his appellate counsel rendered ineffective assistance of counsel by failing to appeal " the fact that the trial judge directed a partial directed verdict on the jurisdictional element of counts eleven and fifteen;" second, his trial counsel failed to object to the trial court's jury instruction as well as the prosecution's closing argument when they suggested that the jury should "conclusively assume that Petitioner was Indian, thus relieving the jury of its duty to decide all elements of the indicted offense." [Second] Amended Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (28 U.S.C. § 2255) (Doc. #226) ("Motion") at 4 (A).

Although Ricardo does not identify the alleged jurisdictional flaws in counts 11 and 15 (charging him with two separate assaults with a dangerous weapon), the Court's examination of the Indictment leads it to conclude that the challenged jurisdictional element must be the location where the alleged crimes occurred: "in the District of Arizona, within the confines of the Salt River Pima-Maricopa Indian Community, Indian Country." But there was no question or argument regarding the location of these two crimes during the trial, and Briones, Jr. offers no reasoning or evidence to

challenge the location of where these two crimes occurred. In the absence of argument or evidence to challenge the jury instruction, the Court concludes that counsel did not perform ineffectively on this front.

The trial counsel's failure to object to the jury instruction regarding Ricardo's status as a Native American Indian also did not amount to constitutionally defective performance because his trial counsel had already stipulated during the trial that Ricardo was, in fact, a "Native American Indian [] as defined in Title 18, United States Code, § 1153.'" RT (05/06/97) at 79:8-80:5. Ricardo offers no additional argument that his attorney's underlying stipulation amounted to ineffective performance.

The Court denies Ricardo's first ground for relief.

Ground II: The government's failure to disclose all prosecution agreement that it had entered into with Norval Antone and Gilland Fulwilder violated Ricardo's Fifth-Amendment right to due process of law.

In his second ground, Ricardo alleges that the prosecution failed to disclose its agreements among two witnesses named Norval Antone and Gilland Fulwilder which ensured that, in exchange for their testimony against Ricardo, the government would drop their pending murder charges. See Motion at 4 (B); Ricardo's Reply to Governments' Response to Writ Filed Pursuant to

28 U.S.C. § 2255 ("Reply") (Doc. #265) at 5:10-17 (quoting the respective witnesses' in-court denials to the contrary but observing that "now that the trial is over, and charges against both these individuals have been dropped, the government is asking this [C]ourt to believe despite the fact that there was no 'formal written deal,' that there was also no 'informal gentlemen's agreement' which lead to the charges against these two individuals to be dropped. This is just too big a pill to swallow without a proper evidentiary hearing to discover the real truth of what occurred" [emphasis in original]); accord Eli Paul Mazur, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 Duke L.J. 1333, 1336 (2002) ("[r]esearch shows that witnesses are more likely to lie, more likely to cooperate, and more likely to fabricate when agents of the state make implicit rather than explicit promises of leniency. Moreover, the procedural safeguards erected to protect the accused from the dangers of the institutionalized plea agreement are ineffective when a witness merely has a rational expectation of leniency").

The government does not deny that the charges against these two witnesses have been dropped but reiterates the witnesses' denials regarding any undisclosed leniency-for-testimony agreements. See Government's Response to Petition for Writ Pursuant to 28 U.S.C. § 2255 ("Response") (Doc. #244) at 23:22-24. The

government also attaches a grief affidavit that denies the existence of any agreements:

> I, Patrick J. Schneider, Assistant U.S. Attorney, do hereby swear and affirm that there were no agreements between the U.S. Attorney Office or the federal government and witnesses Gilland Fulwilder and Norval Antone which were not disclosed to defense counsel in the case of **United States v. Antone, et al.** CR 96-464-PHX-RCB.
>
> [Affidavit, attached as final page to the government's Response to co-defendant Riley Briones, Jr's motion to vacate under Doc. #243].

Ricardo's claim is governed by a confluence of U.S. Supreme Court and Ninth Circuit decisions. The prosecution's suppression of material, exculpatory evidence favorable to an accused violates the constitutional right to due process of law "irrespective of the good faith or bad faith of the prosecution" under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). And when a witness's reliability may determine guilt or innocence, the U.S. Supreme Court has held that a leniency-for-testimony agreement constitutes the type of credibility evidence which must be disclosed to the defense under *Brady*. See *Giglio v. United States*, 405 U.S. 150, 154 (1972); *United States v. Ramirez*,

608 F.2d 1261, 1266 (9th Cir.1979) (citing *Giglio* among cases for proposition that it is "well established that the prosecutor has a duty to disclose any promises of leniency made to a witness testifying at trial since any such agreement is relevant to his or her credibility"); see also *Hill v. Johnson*, 210 F. 3d 481, 485 (5th Cir. 2000) ("[t]hat an accused's constitutional rights are violated when the State withholds material evidence affecting the credibility of witnesses is well-established"). Specifically, a prosecutor's failure to disclose to the defendant that one of its witnesses has been a promised that he would not be prosecuted if he cooperated with the government violates a defendant's constitutional due-process rights. See *Giglio v. United States*, 405 U.S. at 154-55; see also *Killian v. Poole*, 282 F. 3d 1204 (9th Cir. 2002 (citing *Brady* and *Giglio* among cases for proposition that "[i]f exculpatory or impeachment evidence is not disclosed by the prosecution and prejudice ensues, a defendant is deprived of due process").

That the agreement may have been an informal wink-and-nod understanding makes no difference: every agreement between the government and a witness that exchanges leniency for testimony must be disclosed to the defense. In a case that affirmed a defendant's conviction for failure to actually prove a *Giglio* violation, the Ninth Circuit recognized that even an *implicit* leniency-for-testimony agreement must be disclosed to the defense:

> We are not unaware of the reality that the Government has ways of indicating to witness's counsel the likely benefits from cooperation without making a bald promises, and that conceivably [the witness's] and his counsel's protestations that the Government made no "promises" while perhaps literally true might have been misleading. The prosecutor has a duty to apprise the court when he or she knows the witness is giving misleading testimony regarding such promises or negotiations.
>
> [*Ramirez*, 608 F. 2d at 1266 n.9 (citations omitted); see also *Bagley v. Lumpkin*, 798 F. 2d 1297, 1302 (9th Cir. 1986) ("the more uncertain the agreement, the greater the incentive to make the testimony pleasing to the promisor" [quoting *Boone v. Paderick*, 541 F. 2d 447, 451 (4th Cir. 1976)]);

Several other federal courts agree. See, *e.g.*, *Brown v. Wainwright*, 785 F. 2d 1457, 1464-65 (11th Cir. 1986) (rejecting the State's interpretation that *Giglio* forbids only those agreements where the 'promise of leniency' is express; "[c]ertainly *Giglio* does not require that the word 'promise' is a word of are that must be specifically employed. ...The state's argument misconceives the constitutional

concerns addressed by *Giglio*. It is a constitution we deal with, not semantics"); *Zuern v. Tate*, 101 F. Supp. 2d 948, 971 (S.D. Ohio 2000) ("[o]f course, the state's obligation under *Brady* is not limited to instances where it has entered into an express agreement with one of its witnesses. For instance, in *Alderman v. Zant*, 22 F. 3d 1541, 1554 (11th Cir. [1994]), cert. denied, 513 U.S. 1061, 115 S. Ct. 673, 130 L.Ed.2d 606 (1994), the Eleventh Circuit noted that the prosecutor has made an express promise to a witness")].

Unfortunately for Ricardo however, he has not alleged sufficient facts to warrant an evidentiary hearing on his claim. Ricardo's entire ground rests on the raw fact that the two witnesses testified against him and then later the government dropped their pending charges which, as a matter of law, does not amount to the "substantial indicia of a prior agreement" to justify an evidentiary hearing:

> Even if a prior plea bargain has not been clearly established, where there is a substantive claim an undisclosed agreement had been reached, *DeMarco v. United States*, 415 U.S. 449, 450, 94 S. Ct. 1185, 39 L.ED.2d 501 (1974) [(per curium)], requires remanding the case to the district court to conduct an evidentiary hearing in order to determine whether a bargain was reached prior to the witness's giving of his testimony.

> However, the mere fact that the witness was subsequently allowed to plead to a lesser offense in and of itself is not sufficient to warrant a *DeMarco* hearing. In *DeMarco*, the existence of a plea agreement was clear and the remarks of the United States Attorney at the witness's sentencing hearing indicated that the agreement may have been reached prior to the witness's testimony. Appellant has not presented us with any substantial indicia of a prior agreement allowing for a misdemeanor disposition other than [the witness's] actual plea three days after appellant's trial. The transcript of the [witness's] proceedings provided by the appellant does not reveal any evidence of a plea bargain which, if it existed, was required to have been disclosed on the record under Federal Rule of Criminal Procedure 11(e) (2).
> [*Ramirez*, 608 F. 2d at 1267 citations omitted)].

Like the *Ramirez* court, this Court has not been presented with "any substantial indicia of a prior agreement" among the government and the disputed witnesses. In fact, Ricardo's raw allegation presents less evidence of an agreement than the *Ramirez* court faced when it denied remanding the case to the district court for an

evidentiary hearing. See *Ramirez*, 608, F. 2d at 1266 n.9 (concluding that "there is no substantive evidence that [an implicit leniency-for-testimony agreement] occurred in the instant case" even though the witness was allowed to plea to a misdemeanor shortly after the defendant's trial and the prosecutor's pre-trial letter to the witness's attorney state that the witness will given the opportunity to plead guilty to certain crimes in exchange for cooperation but that no promises could or would be made; "the record is void of any evidence that an agreement allowing such a disposition had been reached *at the time of the trial* which was not disclosed to the jury" [emphasis added]); accord *DeMarco*, 415 U.S. at 450 (holding that whether a leniency-for-testimony agreement was "made after or before [a defendant's] trial" is "dispositive" in determining whether there has been a *Giglio* violation.

The *Ramirez* holding remains good law in this Circuit and in other Circuits as well. See, *e.g.*, *United States v. Cooper*, 173 F. 3d 1192, 1203 (9th Cir. 1999) (citing *Ramirez* in affirming defendant's conviction; "[a]s the defense established at trial, [the testifying witness's] credibility was shaky at best. He faced potential criminal prosecution in the United States, so it seems unlikely that he would return to testify only because he wanted to tell the truth. This, however, is at most circumstantial evidence of an immunity agreement with [the witness]. A defendant must present more direct evidence of an agreement to justify reversal on this

ground"); *United States v. Molina*, 75 F. 3d 600, 602 (10th Cir. 1996) (citing *Ramirez* in affirming defendant's conviction because "[t]he mere fact that the witnesses were subsequently allowed to plead on favorable terms is not evidence that the plea agreements were secretly reached prior to the witness' testimony and improperly withheld from the defense"); *United States v. Baskes* 649 F.2d 471, 476-77 (7th Cir. 1980) (citing *Ramirez* in affirming defendant's conviction; testifying witnesses' attorney's "hopeful expectation" that his clients' testimony might help them avoid criminal exposure "even when supplemented by evidence that government attorney used language [in communicating with another government attorney] concerning the possibility of granting informal immunity is not sufficient to warrant a new trial under the rationale of *Giglio*. The situation is too equivocal to deem the witnesses' answers false and the government under a duty to correct or qualify them" [citations omitted]).

Finally, counsel for Ricardo and his co-defendants exposed the two witnesses' motivation to testify by vigorously cross-examining them, thus fulfilling a procedural safeguard against false testimony under the Sixth-Amendment Confrontation Clause and the Fifth-Amendment Due Process Clause. See RT (04/18/97) at 10:21-21:9 (Fulwilder's cross-examination by Philbert Antone's counsel); *id.* at 21:14-55:9 (same by Ricardo's counsel); *id.* at 55:14-103:22 (same by Briones, Jr.'s counsel); *id.* at 110:6-190:7 (same by

Briones, Sr.'s counsel); *id.* at 190:19-232:2 (same by Webster's counsel); RT (04/24/97 at 137:13-183:18 (Norval Antone's cross-examination by Philbert Antone's counsel); *id.* at 184:17-222:7 (same by Ricardo's counsel); *id.* at 222:11-270:20 (same by Briones, Jr.'s counsel); RT (04/25/97) at 5:13-37:15 (same by Briones, Sr.'s counsel); *accord Delaware v. Van Ardsall,* 475 U.S. 673, 678-79 (1986) (reaffirming that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination").

The Court denies Ricardo's second ground for relief.

Ground III. Ineffective assistance of counsel based on failure to object to jury instruction.

In his third ground, Ricardo argues that his trial counsel failed to object to the Court's jury instructions, asserting that a conviction for the RICO-conspiracy offense under count 17 requires jury unanimity regarding both the conspiracy to participate in a racketeering enterprise as well as unanimity regarding the finding that Ricardo himself committed at least two underlying acts that make up the conspiracy. *See* Motion at 5.

The government responds by quoting from the Court's jury instructions, which explicitly stated that count 17 required that the jury find beyond a reasonable doubt that "the defendant agreed that someone, *not necessarily the defendant*, would commit at least two racketeering

acts." Response at 24:3-13, *quoting* RT (05/08/97) at 79:4-7 (this Court's emphasis added). The government also notes that he Court correctly explained "the 'at least two' required acts of racketeering" by reading the instructions to the jury that "A pattern of racketeering activity is at least two racketeering acts that have a relationship to each other plus a threat of continuity. ... The enterprise element of RICO requires that the organization, formal or informal, be an entity separate and apart from the pattern of activity in which it engages. ... It is also not necessary to show that the organization has some function wholly unrelated to the racketeering activity. Rather, it is sufficient to show that the organization has an existence beyond that which is merely necessary to commit the predicate acts of racketeering. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an ongoing basis is adequate to satisfy the separate existence requirement." *Id.citing* RT (05/08/97) at 79:10-86:14; *see also id.* at 86: 22-23 ("You[r] verdict, whether guilty or not guilty, must be unanimous").

The government also points to the jury's unanimous verdicts under counts 2 and 12 as constituting the two underlying racketeering acts. *See* Response at 24:10-12 ("as the jury unanimously convicted on counts 2 and 12 of the indictment (which constituted the two racketeering acts) the jury necessarily was unanimous on the racketeering predicates").

Appendix E

Although Ricardo himself was not charged or found guilty of the underlying Subway robbery/killing under count 2 (interference with commerce by threats or violence in violation of 18 U.S.C. § 1951), the ground on which Ricardo advances this claim for relief ultimately fails because the Court provided the jury with the proper instructions.

The Subway incident constituted one of the *RICO-conspiracy's* underlying predicates which, along with count 12's witness tampering in which Ricardo happened to personally engage, fulfills the law's requirement that the *enterprise itself* commit two underlying acts of racketeering in furtherance of the conspiracy.

The substantive offense of participating in the conduct of an enterprise through a "pattern of racketeering activity" that affects interstate commerce- that is, violating the Racketeer Influenced Corrupt Organization statutes- is prohibited under 18 U.S.C. § 1962 (a), (b), and (c). The phrase "pattern of racketeering activity" refers to at least two acts of "racketeering activity" listed under 18 U.S.C. § 1961 (5), commonly referred to as "predicate acts."

The government charged neither Ricardo nor his co-defendants with actually engaging in a "pattern of racketeering activity." Instead, under count 17, the government charged Ricardo with *conspiring* to violate the RICO statutes under 18 U.S.C. § 1962 (d) (making it unlawful "for any person to conspire to violate any of the provisions of

subsection (a), (b), or (c) of this section"). *See* Indictment at 1-17:1.

Evaluating the RICO-conspiracy statute through the lens of general criminal conspiracy law, the U.S. Supreme Court held that a conviction for violating 18 U.S.C.§ 1962 (d) will stand so long as the evidence shows that the defendant merely "adopt[s] the goal of furthering or facilitating the criminal endeavor" which can be accomplished "in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion" by "agreeing to facilitate only some of the acts leading to the substantive offense." *Salinas v. United States*, 522 U.S. 52, 65 (1997) (unanimous) (calling the proposition "elementary" that " a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself"). When the *Salinas* defendant challenged his RICO-conspiracy conviction in light of the jury's acquittal on the substantive RICO counts under subsections (a), (b), and (c) by faulting the trial court for not instructing the jury that "he must have committed or agreed to commit two predicate acts himself," the unanimous Supreme Court held "[h]is interpretation of the conspiracy statute wrong." 522 U.S. at 63. "The RICO conspiracy statute, § 1962 (d), broadened conspiracy coverage by omitting the requirement of an overt act; it did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the

one to commit two predicate acts." *Id.* at 64. That the substantive RICO offenses under § 1962 (a), (b) and (c) requires two or more predicate acts "makes no difference," the Supreme Court explained, as the "interplay between [the substantive offenses and the conspiracy offense] does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense." *Id.* at 65.

In his Motion to Vacate, Ricardo never disputes his *factual* involvement in the Rolling 30's gang or otherwise question that he "adopt[ed] the goal of furthering or facil tating the criminal endeavor" by "agreeing to facilitate only some of the acts leading to the substantive offense." *Salinas*, 522 U.S. at 65. His agreement to conspire with the Rolling 30's in committing a "pattern of racketeering activity," then, is supported by two overt acts. First, although it is not necessary that he himself committed either of the two overt acts, one of the conspiracy's overt acts entailed tampering with a witness that happened to be committed by Ricardo himself. The jury found Ricardo himself guilty of count 12- tampering with a witness- and the government included this conduct as one of the overt acts committed by the RICO conspiracy under count 17. *Compare* Indictment at 9:16-23 (charging under count 12 that "[o]n or about April 5, 1995 in the State and District of Arizona, the defendant, RICARDO BRIONES ('Joker'), RILEY BRIONES, JR.('Mr.

Spitz') and John Doe (2), did knowingly use physical force against Norval Antone by hitting him in the face with the handle of a pistol with the intent to hinder, delay, and prevent Norval Antone from communicating with law enforcement officers about the federal offenses committed by the Eastside Crips 'Rolling 30's' and the May 15, 1994 Subway homicide. [¶] In violation of Title 18, United States Code, Sections 1512 (b)(3) and 2") *and* Indictment at 15:23-16:2 (charging as one of count 17's overt acts that "[o]n or about April 5, 1995, John Doe (1) hit Norval Antone in the head with a pistol, causing bodily injury to him because the gang suspected Norval Antone of providing information to law enforcement. After they thought that Norval Antone was unconscious, RICARDO BRIONES ('Joker'), John Doe (1), and John Doe (2), and others known and unknown talked about killing Norval Antone to assure that he would not talk to the authorities") *with* 18 U.S.C. § 1961 (1)(B) (listing violations of 18 U.S.C. § 1512 (relating to tampering with a witness, victim, or an informant) as one of the indictable acts that constitutes "racketeering activity").

The second overt act committed by the Rolling 30's gang occurred in the robbery and killing at the Subway restaurant. *Compare* Indictment at 14:11-21 *with* 18 U.S.C. § 1961 (1)(B) (listing violations of 18 U.S.C. § 1951 (relating to interference with commerce through robbery and extortion, also known as the Hobbs Act) as one of the indictable acts that constitutes "racketeering

activity"). The indictment reflects what later emerged at the trial: Ricardo met with other gang members and suggested that they commit armed robberies, even though it was during a later, separate occasion (without Ricardo present) that some other gang members specifically suggested that they commit an armed robbery of a Subway restaurant (which eventually occurred, again without Ricardo present). *See* Indictment at 14:7-10. In light of *Salinas*, however, the proximate causation between Ricardo's general suggestion that the gang commit some armed robberies and the gang's eventual robbery and killing at the Subway restaurant no longer matters" Ricardo's undisputedly heavy involvement in this gang enterprise makes him liable for the acts of his co-conspirators when they committed crimes that furthered this conspiracy's objectives; by requiring the jury to unanimously find two underlying racketeering acts- independent of the alleged existence of the racketeering conspiracy- the Court's instruction complied with the law. *See Salinas*, 522 U.S. at 63-65.

The Court recognizes, of course, that the U.S. Supreme Court did not decide *Salinas*, until approximately six months after the completion of Ricardo's trial and sentencing. In fact, at the time of the trial the Ninth Circuit had held just the opposite in *Neibel v. Trans World Assurance*, 108 F.3d 1123, 1128 (9th Cir. 1997) (cited by Ricardo in his Reply at 7:21-24). The *Neibel* court adopted the Third Circuit's position that "[l]iability under

section 1962 (d) would be permissible under the first scenario [of conspiring *to* operate or manage an enterprise], but, without more, not under the second [of conspiring *with* someone who is operating or managing the enterprise]. *Neibel*, 108 F.3d at 1128, *quoting United States v. Antar*, 53 F. 3d 568, 581 (3rd Cir. 1995).

In the wake of the Supreme Court's *Salinas*, decision, however, it appears that *Neibel's* interpretation of the RICO-conspiracy statute cannot survive. The Court specifically held that its broad reading of the RICO-conspiracy statute would trump concerns regarding the tenuous connection between a defendant and the charged conspiracy to further the enterprise.

> In some cases the connection the defendant had to the alleged enterprise or to the conspiracy to further it may be tenuous enough so that his own commission of two predicate acts may become as important part of the Government's case. Perhaps these were the considerations leading some of the Circuits to require in conspiracy cases that each conspirator himself commit or agree to commit two or more predicate acts. Nevertheless, that proposition cannot be sustained as a definition of the conspiracy offense, for it is contrary to the principles we have discussed. [522 U. S. at 65-66].

Tellingly, the Third Circuit itself had overruled *Antar* to the extent that it conflicts with the Supreme Court's broad reading of the RICO-conspiracy statute explicated in *Salinas*. *See Smith v. Berg*, 247 F. 3d 532, 534 (3rd Cir. 2001) (affirming district court's conclusion that *Salinas* implicitly overruled *Antar's* conspiracy interpretation; "[w]e hold that any reading of *United States v. Antar* to the effect that conspiracy liability under section 1962 (d) extends only to those who have conspired personally to operate or manage the corrupt enterprise, or otherwise suggesting that conspiracy liability is limited to those also liable, on successful completion of the scheme, for a substantive violation under section 1962 (c), is inconsistent with the broad application of general conspiracy law to section 1962 (d) as set forth in *Salinas*" [citation to *Antar* omitted]); 247 F.3d at 538 ("any reading of *Antar* suggesting a stricter standard of liability under section 1962 (d) is inconsistent with the broad application of general conspiracy law set forth in *Salinas*. In accord with the general principles of criminal conspiracy law, a defendant may be held liable for conspiracy to violate section 1962 (c) if he knowingly agrees to facilitate a scheme which includes the operation or management or a RICO enterprise"). Other Circuits agree. *See, e.g., United States v. Posada-Rios*, 158 F.3d 832, 857-58 (5th Cir. 1998) (agreeing with the Second, Seventh, and Eleventh Circuit's pre-*Salinas* decisions that the "better-reasoned rule" is that the RICO-conspiracy statutes do not require

evidence that the defendant managed or controlled the conspiring organization). As one of our sister districts in the Ninth Circuit has concluded, "[i]n light of *Salinas* and [a U.S. Supreme Court case which reaffirmed it], it appears to this court that *Neibel* is no longer good law." *Does I v. The Gap*, 2002 WL 1000068, * 9 n.20 (D.N. Mar.I. 2002) (reviewing RICO-conspiracy case law and finding that "the Supreme Court's decision in *Salinas* defines and governs what constitutes a violation of § 1962 (d)").

Until the then-recently-decided *Neibel* decision, this Court's jury instructions fully complied with Ninth Circuit law. *See, e.g., United States v. Tille*, 729 F.2d 615, 619 (9th Cir. 1984) (holding that the RICO-conspiracy statute "does not require proof that a defendant participated personally, or agreed to participate personally, in two predicate offenses. Read in context, section 1962 (d) makes it unlawful to conspire to conduct or participate in the conduct of an enterprise's affairs, where its affairs are conducted though a pattern of racketeering activity.... Proof of an agreement the objective of which is a substantive violation of RICO (such as conducting the affairs of an enterprise though a pattern of racketeering) is sufficient to establish a violation of section 1962 (d). It is only when proof of such an objective is lacking that the evidence must establish the defendant's participation or agreement to participate in two predicate offenses"), *cited in Salinas*, 522 U.S. at 61-62 (identifying the Ninth Circuit as one of the

Circuits that "take a contrary view" to the proposition that a "defendant must himself commit or agree to commit two or more predicate acts"); *United States v. Frega*, 179 F.3d 793, 810 n.21 (9th Cir. 1999) (agreeing with the dissent that *Salina's* and *Tille's* holding are synonymous).

But even if the *Neibel* court's holding issued less than three months before the Court provided the jury instructions made this Court's jury instructions incorrect at the time of Ricardo's trial (and hence his counsel's performance ineffective for failing to challenge the instructions on this ground), this Court is forbidden to recognize any resulting prejudice from counsel's performance now that the instructions complete with the law *as it currently stands* under a doctrine established in *Lockhart v. Fretwell*, 596 U.S. 364, 372 (1993) (holding that no legally cognizable "prejudice" arises "if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him"). *See id.* at 374 (O'Connor, J., concurring) ("today we hold that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission"); *see also Grisby v. Blodgett*, 130 F.3d 365, 372 (9th Cir. 1997) (observing that *Lockhart* prevents a habeas petitioner's ineffective-assistance-of-counsel claim that arises from counsel's failure to make a motion based on a

latter-overruled state-court decision); *Fogg v. Kernan*, 1998 WL 470470, *10 (N.D. Cal. 1998) (denying habeas relief in part because "[i]n *Fretwell*, the Supreme Court held that a habeas petitioner cannot demonstrate prejudice for purposes of the *Strickland* test if the petitioner is complaining about his lawyer's failure to raise a defense that although valid at the time of the proceeding was subsequently declared invalid by a higher court").

Furthermore, Ricardo's assertion that "the failure of the trial court to give a more specific charge on unanimity resulted in a manifest injustice which invalidated the verdict since it denied him of due process of law in violation of the Fifth Amendment" because "[a] profusion of crimes of which Ricardo was not charged were placed before the jury as well as the evidence, innuendo and speculation to support them" (Reply at 8:12-15 is squarely defeated by the Court's instructions to the jury that specified which defendants had been indicted under each count as well as by the instructions that explained the requirement for separate unanimity in the verdicts. *See* RT (05/08/97) at 43:19-44:2 (Court reading instruction that "A separate crime is charged against one or more of the defendants in each count. The charges have been joined for trial. You must decide the case of each defendant on each crime charged against that defendant separately. Your verdict on any count as to any defendant should not control your verdict on any other count as to any other

defendant"); *id.* at 41:16-86:14 (Court reading instructions to the jury, detailing the crimes charged against each defendant).

Finally, Ricardo does not identify the alleged "intervening change in the substantive law such that Petitioner's conviction is for conduct which the law does not criminalize" (Motion at 5) and the Court's own research did not uncover either the purported change in the law (other than the Ninth Circuit's Neibel decision, addressed above) or the conduct which is no longer criminalized.

The Court denies the third ground for relief.

Ground IV: Ineffective assistance of counsel based on failure to refute Detective Auerbach's rendition of Arlo Eschief's out-of-court-statements.

In his fourth ground, Ricardo alleges that his counsel should have refuted Police Detective Auerbach's rendition of Arlo Eschief's out-of-court-statements regarding what happened during the night of the gang's robbery and killing which took place at a Subway restaurant (comprising the second predicate act under count 17's RICO-conspiracy charge). See Motion at 5[10]

---

[10] Arlo Eschief is the person who actually pulled the trigger and murdered the Subway clerk named Brian Patrick Lindsey. See *United States v. Eschief*, 108 F.3d 1386, 1997 WL 107754, *1 (9th Cir. 1997) (unpublished memorandum disposition) (affirming Eschief's conviction for first degree felony-murder, second-degree murder, and use of a firearm during a violent crime, all on an Indian reservation).

In the process of investigating the crime, two police detectives interviewed Eschief near Eschief's home on two

Appendix E

The government responds that Ricardo lacks standing to challenge the statements' admissibility (and, presumably, his counsel's related performance) because Eschief's out-of-court statements related solely to counts 1 and 2 (first degree/felony murder and interference with interstate commerce, respectively, regarding the Subway incident) under which Ricardo was never charged. See Response at 24:21-24 (maintaining that Ricardo lacks standing to challenge the statements because, "[a]s the indictment clearly indicates, the petitioner was not charged in Counts

---

separate days in late April 1994. Over the defendant's pre-trail and contemporaneous objections, one of these two police detectives- Karl Auerbach- testified in court regarding what Eschief had told him and his colleague. *See* RT (05/05/97 at 22:2-27:2. According to Detective Auerbach's in-court-rendition of Eschief's out-of-court statements, Eschief did not mention Ricardo as having participated in the Subway incident. *See id.* at 26:15-20 ("Arlo Rodney Eschief had indicated to me that he, Philbert J Antone, and John Webster had exited the car and went into the Subway Restaurant, while Riley Briones, Jr. remained seated in the car"). At an early point in the first day of the two Eschief interviews, however, Eschief acknowledged that he had "[hung] around" with certain people during the time of May 1994 (the time of the Subway incident) and one of the people whom Eschief reportedly included in the list happened to be Ricardo. *See id.* at 22:3-7

(Question: Detective Auerbach, did Mr. Eschief indicate to you who he was associating with back in May of 1994? Answer: Yes. Arlo Rodney Eschief had indicated to me that he was hanging around Riley Briones, Jr., Ricardo Briones, Philbert J. Antone- P.J. Antone-and John Webster").

1 and 2 of the indictment and therefore the statements were not introduced against him").

As Ricardo himself realizes later in his Reply under ground nineteen, the government's reasoning arguably contradicts its position regarding the underlying admissibility of Eschief's statements since part of the jurisdiction in allowing Detective Auerbach to testify regarding Eschief's out-of-court statement that Eschief had indeed "hung around" with certain people (including Ricardo) during the time period when the Subway incident took place is that the statements were against Eschief's penal interest because the statements linked Eschief with "co-conspirators" in the Subway robbery and killing, and the government indicted Ricardo with count 17's RICO-conspiracy charge which lists the Subway incident as one of the required "overt acts." *Accord* Government's Motion *in limine* to Introduce Statements of Arlo Eschief (Doc. #28) at 11:14-18 (describing the statement regarding hanging around with people (including Ricardo) as "sufficiently 'against interest' as it links [Eschief] to those who conspired to rob the Subway incident"); Order (04/10/97 (Doc. #39) at 11:1-22 (Court agreeing with the government on this point).

But assuming that Ricardo retains standing to object to Detective Auerbach's rendition of Eschief's out-of-court statements- rather, as presented in this Motion to Vacate, standing to object to his counsel's performance regarding the statements' admission into trial- Ricardo fails to explain *how* his counsel should have rebutted the

testimony or otherwise point to *which* evidence or witness could have countered the testimony. *Accord* Government's Response at 23:27-24:3.

Ricardo's failure to specify how his attorney could have offered better performance prevents this Court from granting relief. *See Jones v. Gomes*, 66 F.3d 199, 205 (9th Cir. 1995) (affirming district court's denial of habeas relief because the petitioner's "conclusory suggestions that his trial and state appellate counsel provided ineffective assistance fall far short of stating a valid claim of constitutional violation").

The Court denies the fourth ground for relief.

Ground V: Ineffective assistance of counsel based on failure of appellate counsel to raise the issue that the Court's admission of Eschief's out-of-court statements violated the Sixth Amendment's Confrontation Clause.

In Ricardo's fifth ground, he specifically argues that his appellate counsel should have raised the following issue on direct appeal: the Court's admission of Arlo Eschief's out-of-court statement through Detective Auerbach's testimony violated Ricardo's Sixth-Amendment right to confront the witnesses against him. See Motion at 7. For the reasons described in this Order's immediately preceding section, this Court remains doubtful regarding the government's contention (*see* Response at 25:4-7) that Ricardo somehow

lacked standing to object to the out-of-court statement's admission.

Ricardo's argument is similar to the argument advanced by his co-defendant, Briones, Sr. Unlike Briones, Jr. but similar to Briones, Sr., Ricardo was not present during the actual Subway robbery and killing but nonetheless suffered the consequences of advancing the gang's objectives which included the Subway incident. Therefore, to whatever extent Ricardo's attorney ineffectively performed by not raising a Confrontation Clause argument against the introduction of Eschief's statements through the testimony of Detective Auerbach, the Court finds no prejudice from the alleged error because the asserted Confrontation Clause violation itself was harmless. *See* Order re: Riley Briones, Sr. (Doc. not yet determined).

The Court denies the fifth ground for relief.

Ground VI: Ineffective assistance of counsel based on counsel's failure to move to suppress testimony from "bribed" witness.

In his sixth ground, Ricardo asserts that the government's explicit offer of leniency in exchange for testimony from certain witnesses (apparently John Webster) constitutes illegal bribery under 18 U.S.C. § 201 (c)(2) (establishing up to two years' imprisonment for "[w]hoever... gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other

proceeding, before any court... authorized by the laws of the United States to hear evidence or take testimony..."). *See* Motion at 7. Although a three-Judge panel of the Tenth Circuit championed Ricardo's interpretation in *United States v. Singleton*, 144 F.3d 1343, 1347-48 (10th Cir. 1998), the full Tenth Circuit vacated the panel's opinion and rejected the notion that a government agent's leniency-for-testimony agreement amounts to a "bribe": See *United States v. Singleton*, 165 F.3d 1297, 1298-1302 (10th Cir. 1999) (en banc) (holding that the statute's word "whoever" does not include government agents acting withing the scope of their authority to exercise the government's prosecutorial powers, given the absence of clear language evincing Congress' intent to overturn such "ingrained aspect of American legal culture" as leniency for testimony). The Ninth Circuit has rejected Ricardo's argument as well, discerning "no merit" in the claim and observing that the contention has been "firmly rejected" by other Courts of Appeals. *United States v. Mattarolo*, 209 F. 3d 1153, 1160 (9th Cir. 2000); *see also United States v. Smith*, 196 F. 3d 1034, 1038 (9th Cir. 1999) (joining "every circuit that has considered it" in rejecting defendant's Singleton claim).

Ricardo's contention that the U.S. Constitution and several Senate-ratified international treaties outlaw bribery (*see* Reply at 9:1-12:8) similarly fails to persuade this Court to grant relief, as the Ninth Circuit has rejected the fundamental premise that a prosecutor's offer of

leniency in exchange for truthful testimony constitutes a bribe in the first place.

The Court also notes that it cautioned the jury regarding Webster's testimony on three occasions. The first time occurred when Webster actually pleaded guilty to count 17 and the second time occurred when the Court acquiesced to Ricardo's co-defendant Briones, Sr.'s counsel's request that the Court should re-caution the jury immediately before John Webster actually took the stand a week later:

> I previously told you- I believe it was about a week ago- that Mr. Webster had entered a plea of guilty to Count 17 of the indictment, the RICO charge, and in exchange, the government will ask that I dismiss the other charges against Mr. Webster, and as I told you, as a part of that plea agreement, Mr. Webster will be called for the government to testify, and that's going to occur today[¶] Mr. Websters' guilty plea is not evidence against any of the other defendants, and you may consider it only in determining Mr. Webster's believability. You should examine his testimony, you should consider the extent to which you [sic] may have been influenced by his plea agreement with the government [¶] Although the defendants are being tried together, you must give separate

> consideration for each defendant. In doing so, you must determine what the evidence in the case proves with respect to each defendant, leaving out of consideration any evidence admitted solely against some other defendant. The fact that Mr. Webster has pleaded guilty should not influence in any way your verdict as to any other defendant. [RT (04/29/97 at 44:7-45:3].

The Court's third warning took place in the form of reading to the jury an instruction that complies with the Ninth Circuit's Model Criminal Jury Instructions by cautioning the jury to carefully scrutinize any compensated testimony"

> [S]ome [accomplices] received benefits, compensation or favored treatment in connection with this case. You should consider such testimony with greater caution than that of an ordinary witness, and you should consider the extent to which it may have been influenced by the receipt of those benefits, compensation or favored treatment.
>
> [RT (05/08/97 at 50:2-11; *accord* Comm. On Model Criminal Jury Instructions Within the Ninth Circuit, Manual of Model Criminal Jury Instructions 4.9 ("Testimony of Witness under Gant of Immunity"),

4.10 ("Testimony of Witness Receiving Benefits"), 4.11 ("Testimony of Accomplice") (2000) (each model instruction containing language that the jury should consider the testimony "with greater caution than that of other witness")].

The above-quoted instructions served the "essential procedural function[]" of "reinforc[ing] the defense's cross-examination by attacking the generalized trustworthiness of accomplice testimony." Mazur, 51 Duke L.J. at 1354.

The Court denies the fifth ground for relief.

Ground VII: Ineffective assistance of counsel on counsel's failure to request a *James* hearing or a hearing under Federal Rule of Evidence 104.

In his seventh ground, Ricardo faults his counsel on two fronts: first, counsel failed to request a court-based determination of certain persons' qualifications to be a witness and the admissibility of their testimony (under Federal Rule of Evidence 104); second, counsel should have requested what is called a *James* hearing to assess whether substantial independent evidence of a conspiracy exists which would justify admission of an alleged co-conspirator's statement into evidence Under FRE 801 (d)(2)(E). *See* Motion at 7.

Addressing the *James* argument first, the Court observes that the district court's authority to conduct a *"James hearing"* stems from a Fifth Circuit decision which held that a co-

conspirator's statements are admissible FRE 801 (d)(2)(E) hearsay exception only if substantial independent evidence of a conspiracy exists. See *United States v. James*, 590 F.2d 575, 581 (5th Cir. 1991) (en banc), *abrogated on other grounds as recognized in the United States v. Fragoso*, 978 F.2d 896, 900 (5th Cir. 1992). As one of the potential methods by which a district court can determine the admissibility of the statements, the court can conduct an outside-of-the-jury's-presence hearing known as a *James* hearing. See *United States v. Williams*, 264 F.3d 561, 576 (5th Cir. 2001).

The *James* court recognized, however, "that if the district court 'determines it is not reasonably practical to require a showing to be made before admitting the evidence, [it] may admit the statement subject to being connected up'" through a subsequent final determination of the statement's admissibility. See *United States v. Baltas*, 236, F.3d 17, 35 (1st Cir. 2001) (footnote omitted; brackets added by the *Baltas* court). The district court retains discretion over how to conduct the admissibility determination. See *Williams*, 264 F.3d at 576.

In this case, this Court considered and rejected Ricardo's co-defendant Briones, Sr.'s request for a *James* hearing. *See* Motion for *James* Hearing (Doc. #74); RT (04/29/97) at 27:12-42:13. Because Ricardo's motion to vacate does not disclose the testimony which this Court allegedly improperly admitted, this Court can only assume that he hinges his claim on the same statements

attacked by Briones, Sr. when his counsel requested a *James* hearing. In light of this assumption, no constitutionally cognizable prejudice could have arisen from Ricardo's counsel's failure to request a *James* hearing on the same matter advanced by his co-counsel.

Turning to the second argument regarding FRE 104, Ricardo cites Ninth Circuit case law which holds that a trial judge's ability to consider the co-conspirator's out-of-court statement in assessing the statement's *admissibility* under FRE 104 does not affect the inherent *unreliability* of the statement, which in turn requires that the co-conspirator's statement that implicates the defendant in the alleged conspiracy must be corroborated by "fairly incriminating evidence." *See* Rely at 13:12-18, *quoting United States v. Silverman*, 861 F.2d 571, 577-78 (9th Cir. 1988). Ricardo's ground for relief apparently transforms into an argument that had his trial counsel asked for a hearing for Ricardo alone, the trial result would have been different for Ricardo because Eschief's statements "completely ex[]onerated [Ricardo] from any involvement in the robbery and murder at the Subway Restaurant." Reply at 13:18-23.

This argument fails for several reasons. First, just as the government contradicted itself by initially seeking the admission of Eschief's out-of-court statements against Ricardo on against-penal-interest grounds (since the statements inculpated Ricardo as an asserted "co-conspirator" in the gang"

but then suggested that Ricardo lacked standing to challenge his counsel's performance here because Eschief's statements had no relation to Ricardo at all, it is now Ricardo who contradicts himself: he urges the Court to consider that Detective Auerbach's rendition of Eschief's out-of-court statements implicated him just enough so that Ricardo has demonstrated his standing to assert an ineffective-assistance-of-counsel claim in relation to his counsel's response to the Confrontation Clause problem, but he asserts here that Eschief's statements fully exonerated him from the Subway incident.

More importantly, however, Ricardo's contention displays the fundamental misunderstanding of count 17's RICO-conspiracy charge. There is no question that Ricardo neither specifically discussed robbing the Subway store or was present during the robbery and killing; he was not even charged with this conduct in a separate count. However, Detective Auerbach's rendition of Eschief's account of the Subway incident in no way exonerates Ricardo from *conspiring* to violate the RICO statutes. As explained above, the United States Supreme Court has established that a RICO conspirator need not have been the person who *himself* committed the RICO-conspiracy's two underlying predicate acts: it is Ricardo's substantial involvement in the criminal conspiracy through his agreement to facilitate some of the substantive racketeering acts that supports the jury's finding of guilt under count 17, not his

uncharged involvement in the Subway robbery itself. *See Salinas*, 522 U.S. at 65.

Finally, to the extent that Ricardo advances a jury-confusion claim, the risk of jury confusion has been addressed in this Order in resolving Ricardo's ground two and the current claim for relief adds nothing new to the analysis. As the Ninth Circuit explained in resolving Ricardo's direct appeal, the government's charges against Ricardo related to the series of offenses committed by the codefendants:

> Ricardo argues that he was prejudiced by being brought to trial with co-defendants who were charged with a "laundry list" of crimes for which he was not charged. But joinder was appropriate because the Defendants were charged with acts of conspiracy, some committed by Ricardo and some committed by his codefendants. *See United States v. Hernandez*, 952 F.2d 1110, 1114 (9th Cir. 1991). This case is unlike *United States v. Satterfield*, robberies committed by one defendant alone were unrelated to the ones committed jointly by both defendants. Here, the charges faced by Ricardo were related to the series of offenses committed by his codefendants. [Memorandum at 2-3].

The Court denies the seventh ground for relief.

Appendix E

Ground VIII: Constructive denial of effective assistance of counsel through the Court's failure to issue a stay in a state-court proceeding that involved Ricardo's counsel.

In his eighth ground, Ricardo argues that, although ostensibly represented by an attorney, he was in effect denied effective assistance of counsel because this Court failed to issue a stay in the state-court proceeding in which Ricardo's counsel was involved at the same time that he represented Ricardo in this trial. *See* Motion at 8. In his Reply, Ricardo points to his counsel's submitted affidavit in which his trial lawyer, while not identifying a specific example of ineffectiveness, "does admit that it would have been helpful to spend more time preparing for the federal court trial cross examination." Reply at 14:14-18. Ricardo concludes that his counsel should have withdrawn from one of the two cases and also suggests that this Court abused its discretion in failing to resolve the problem. *See id.* at 14:26-15:3 ("[a]s the Supreme Court has made clear, 'upon the trial judge rests the responsibility that the trial is carried out with solitude for the rights of the defendant.' The court knew of this conflict, but elected to do nothing about it- to the detriment of [Ricardo] Briones' defense" [citation omitted]).

Although the Ninth Circuit "intimate[d] no conclusion on whether counsel was ineffective" when faced with Ricardo's argument on direct review, this Court adopts the reasoning of that court's dicta surrounding this claim:

> [Ricardo] cites no authority for the proposition that counsel's obligation to try two cases in different courts during the same overlapping weeks renders counsel ineffective per se, and points to no evidence of ineffectiveness or defective representation in Ricardo's case. Moreover, the federal judge noted that counsel's responsibilities in the state case were limited to DNA evidence issues, and he was not lead counsel there. [Memorandum at 8].

The Court also rejects Ricardo's underlying claim that this Court should have issued a stay in the stay-court proceedings because the Ninth Circuit has already resolved this issue against him. *See id.* at 8-9 (Ricardo cites no authority for the proposition that the federal judge could have [stayed the state-court proceedings]. Under 28 U.S.C. § 2283, a federal court 'may not grant an injunction to stay proceedings,' unless one of three exceptions applies. Ricardo has not argued for applicability of any of the exceptions, and it is hard to see how he could").

As Ricardo acknowledges, his counsel made this Court aware of the situation during the trial and the Court resolved the matter against him. *See* Reply at 14:8-11.

Ricardo offers no new argumentation in his Motion to Vacate, and relief here is denied.

Ground IX: Ineffective assistance of counsel based on trial counsel's failure to request that the sentencing court properly identify the predicate acts that were used for sentencing Ricardo under count 17's RICO-conspiracy violation.

Ricardo's fundamental contention here is that, during the sentencing hearing, his trial counsel failed to request that the Court properly identify the two underlying predicate acts which were employed in sentencing Ricardo for his RICO-conspiracy conviction under count 17. *See* Motion at 8. In the actual Motion to Vacate, the argument is presented as the counsel's failure to argue that the Court should have resolved its factual determinations through the clear-and convincing standard of proof, not the preponderance-of-the-evidence standard. *See* Motion at 8.

In his Reply to the government's Response, Ricardo refines the claim by asserting an *Apprendi* violation since a jury never found (and, in fact, the government never charged) Ricardo with one of the two underlying predicate acts (the Subway incident) that comprised count 17's RICO-conspiracy conviction. See Reply at 15:14-18:20, *citing Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that, "[o]ther than the fact of a prior conviction," the Fourteenth Amendment's due-process clause and the Sixth Amendment's jury-trial right command that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"), *reaffirmed*

in Ring v. Arizona, 2002 WL 1357257, 122 S. Ct. 2428, 2443 (2002) (applying *Apprendi* in the capital-case context by overruling contrary U.S. Supreme Court authority). In other words, the argument goes, because Ricardo's count 17's RICO-conspiracy conviction hinges on the presence of two underlying acts- count 2's Subway incident and count 12's witness-tampering charge- yet the jury never found that Ricardo participated in the never-charged-against-Ricardo Subway incident, the Court's own conclusion that Ricardo's punishment by sentencing him to 20 years' imprisonment on count 17's RICO-conspiracy violation alone.

At first glance, it may appear that Ricardo's claim is defeated by the Ninth Circuit's prohibition on applying *Apprendi* retroactively to cases on collateral review such as motions to vacate under §2255. *See Sanchez-Cervantes*, 282, F. 3d at 668 (holding that *Apprendi* fails to meet the retroactive application requirements under *Teague v. Lane*, 489 U.S. 288 (1989)). On closer examination, however, a generous reading of Ricardo's *pro se* motion means that his claim survives this bar.

The crux of his allegation is that he was never convicted (or even charged) with participating in the Subway incident, so the Court improperly relied on a Subway-robbery conviction in determining Ricardo's sentence under the RICO-conspiracy charge. *Cf.* Movant's Objection to "Report [&] Recommendation" by Magistrate (Objections) (Doc. #275) at 3:14-20 ("[t]he error occurred when the court instructed the jury that

they must agree that there existed, 'the commission of two or more predicate acts,' but did not instruct them that those acts must be crimes of which [Ricardo] Briones was charged"). Unlike the *Sanchez-Cervantez* scenario where a jury convicted the defendant of the underlying offenses of drug violations but the district court increased his sentence base on the court's own determination of the quantity of drugs used in the crime, Ricardo seems to argue that no jury even convicted him of the two underlying predicate acts of count 17 in the first place. *Accord Sanchez-Cervantez*, 282 F.3d at 669 (holding that the *Apprendi* rule fails to meet *Teague's* increased-accuracy-of-convictions or bedrock-procedural-element threshold because "[t]he alleged *Apprendi* error only concerns an enhancement of the defendant's sentence based on a drug quantity finding by the judge. Therefore, the accuracy of the underlying conviction is not at issue"). Based on the way in which Ricardo frames it, his fundamental argument is not affected by *Apprendi* in the first place because there is no statutory-maximum penalty involved in an uncharged, unconvicted crime.

Ricardo's argument fails, however, because the indictment did allege Ricardo's participation in the Subway incident as one of the "over acts" of count 17's RICO conspiracy. See Indictment at 14:4-10 ("In furtherance of the conspiracy and to accomplish the objects of the conspiracy, the defendants and others committed the following overt acts, among others:[¶] a. On or about April

1994 or the beginning of May, 1994, various members of the enterprise, known and unknown, including defendants Philbert Antone ("Indio"), Ricardo Briones ("Joker"), and John Doe (1), conspired to commit armed robberies"). The jury found Ricardo guilty of *conspiring* to further the gang-related racketeering enterprise of committing armed robberies, and the jury's verdict demonstrates that it found that the conspiracy engaged in two overt predicate acts that furthered the "pattern of racketeering activity": first, count 12's witness tampering (directly committed by Ricardo himself) and second, the Subway robbery and killing charged as an overt act (along with the witness tampering) under count 17's RICO-conspiracy allegations. As this Court explained at the sentencing hearing when addressing Riley Briones, Sr.'s conviction under count 17, "I believe that the defendant's conviction of Count 17 includes all of the conduct perpetrated by the other co-conspirators and the defendant's involvement in the conspiracy. The fact, or the evidence is sufficient to conclude that it existed before May 15 and was never withdrawn." RT (07/28/97) at 53:13-18.

As for Ricardo's original contention that his counsel ineffectively assisted him my failing to argue that the Court should have resolved its factual determinations through the clear-and-convincing standard of proof (as opposed to the preponderance-of-the-evidence standard), this claim fails because no prejudice can be shown. This

Court resolved the sentencing matter under the clear-and-convincing standard of proof, so Ricardo's counsel's failure to argue the higher standard made no difference in the outcome.

The Court denies the ninth ground for relief.

Ground X: Ineffective assistance of counsel based on counsel's failure to investigate the legal impossibility of one of count 17's overt acts.

In his tenth ground, Ricardo argues that his counsel failed to argue that one of the overt acts listed under count 17's RICO conspiracy charge- that John Webster shot at two police officers- would be impossible for John Webster to have performed because John Webster's shooting took place over 600 feet away, and hence presumably John Webster could not have known that the objects of his gun fire happened to be police officers. *See* Motion at 8. Ricardo concludes that the indictment contained "a legally insufficient act that the jury may have used to have convicted Petitioner of count seventeen, thus this count must be dismissed." *Id.*

Ricardo's counsel's performance here did not amount to defective assistance. John Webster's involvement with count 17 became irrelevant once he pleaded guilty to the count. Ricardo's counsel in no way needed to focus on the legal impossibility of identifying the identity of those against whom John Webster attempted to shoot.

The Court denies the tenth ground for relief.

Ground XI: Ineffective assistance of counsel based on failing to object to the Court's charge to the jury that amended the indictment.

In his eleventh ground, Ricardo faults his trial counsel for "not objecting to the Court's charge to the jury that did amend the indictment." Motion at 9. The government understandably finds it difficult to respond, calling the claim "*cryptic*." Response at 28:15-16. In his Reply, Ricardo brings up the argument that the jury may have convicted him of violating § 1962 (d) despite the absence of an indictment of a predicate act. *See* Reply at 19:13-14. That the indictment charges Ricardo with a conspiracy to commit RICO violations- and charges the conspiracy with committing two or more acts through witness tampering and the Subway robbery and killing- has already been addressed in this Order.

This ground for relief is denied.

Ground XII: Ineffective assistance of counsel based on failing to challenge the indictment's jurisdictional defects.

In his twelfth ground, Ricardo states that his counsel provided ineffective assistance by failing to challenge the indictment "as being drafted with a jurisdictional defect" and "for not filing a pre-trial motion that count 17 of the indictment had a jurisdictional defect." Motion at 9. In his Reply, Ricardo explains that the charge lacked specificity. *See* Reply at 20:21-24. Ricardo does not disclose the alleged defect or the alleged ambiguous portion,

and this Court's further examination reveals none (his extrapolation under his fourteenth ground will be addressed below).

Ricardo also raises in his Reply that "[t]he government's entire position is that of uncharged guilty by association" and this Court "erred in admitting all statements that Briones stated in supposed furtherance of the conspiracy." Reply at 21:5-10. (emphasis in original). Without identifying to which of the three Briones defendants he refers, Ricardo concludes that "[t]hese statements relating to uncharged crimes were necessarily prejudicial and compels reversal as to this count as the verdict without the erroneously admitted evidence and jurisdictional defect could not have been reached." Reply at 21:10-14. Assuming that this Court will exercise its discretion in addressing this new argument presented for the first time in Ricardo's Reply, the Court denies this ground because Ricardo presents no additional reasoning to challenge this Court's previous rulings that the out-of-court statements could be admitted as statements made in furtherance of a conspiracy.

The court denies the twelfth ground for relief.

Ground XIII: Ineffective assistance of counsel based on failure to request that he District Court make a determination that he government's expert witness comply with Federal Rules of Evidence 702, 703, and 104 and failure of the District Court to screen the expert witnesses for their expert opinions.

Appendix E

According to Ricardo's Reply, his thirteenth ground "relates to the fact that the district court did not conduct an extensive voir dire to assess the basis for and relevance and reliability of the ATF 'expert' on destructive devices." Reply at 21:25-28. Citing *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), Ricardo maintains that the ATF expert merely "vouched" for the contents of the "evidence transmittal form" and other reports, given that the government failed to establish " a truly independent 'expert opinion.'" Reply at 21:28-22:11.

This ground fails because the ATF expert named Jerry Andrew Taylor detailed on the stand his 17 years of experience as an Explosives Enforcement Officer for the ATF and his 30 years of experience in the area of explosives and incendiary devices. *See* RT (04/16/97) at 188:10-190:19. Additionally, co-defendant Briones, Jr.'s attorney brought out on cross-examination that Taylor did not "examine any evidentiary items in connection with this case" and that Taylor's own report read that " He also brought out that Taylor's own report read that "[t]he evidence could not be analyzed for the presence of ignitable liquids with any meaningful conclusion." *Id.* at *Id.* 194:7-10 and 196:11-17. Ricardo has not established constitutionally recognizable prejudice here.

The Court denies the thirteenth ground for relief.

Appendix E

Ground XIV: Ineffective assistance of counsel based on failure to argue that both the RICO conspiracy's underlying predicate acts had no impact on interstate commerce.

In his fourteenth ground, Ricardo argues that his trial counsel provided ineffective assistance of counsel by failing to file a motion to dismiss the RICO-conspiracy charge under count 17 because counsel should have argued that the two underlying predicate racketeering violations charged under count 17 did not affect interstate commerce and hence there could be no "pattern of racketeering" as a matter of law. *See* Motions at 10. In his Reply, Ricardo explains why robbing Subway lacked both a substantial effect or even a de minimis impact on interstate commerce: "Robbery is not selling, buying, bartering or trading and it produces absolutely nothing." Reply at 24:8-12.

The Ninth Circuit resoundingly defeated this claim when it affirmed this Court's Order which transferred three of Ricardo's co-defendants for prosecution as adults. See United States v. Juvenile Male, 118 F.3d 1344, 1347 (9th Cir. 1997). In its published opinion, the Ninth Circuit determined that this Subway robbery and killing had a "probable or potential impact on interstate commerce" under United States v. Atcheson, 94 F.3d 1237, 1243 (9th Cir. 1996) and held that, because RICO addresses conduct which directly affects interstate commerce, "all that is required to establish federal jurisdiction in a RICO prosecution is a showing that the individual predicate

racketeering acts have a de minimis impact on interstate commerce." 118 F. 3d at 1347 and 1349. This Court adopts the Ninth Circuit's findings regarding how the Subway incident had much more than a de minimis affect on interstate commerce:

> The evidence in this case establishes that Defendant's activities had a probable or potential impact on interstate commerce. As the district court stated, defendants allegedly robbed the Subway sandwich franchise which sends a percentage of its profits to its out-of-state headquarters. In addition to the $100.00 taken, defendants allegedly stole, among other things, sandwiches and chips, many of whose ingredients were purchased from out-of-state suppliers.
>
> In addition, the store was forced to close down for several days after the robbery and murder. New employees had to be hired. Moreover, the firearm used during the robbery had moved in interstate commerce, and the reason for the robbery was to obtain additional firearms (which has a potential impact on interstate commerce).
>
> [118 F. 3d at 1349-1350; accord RT (07/28/97) at 51:14-18 (this Court finding at the sentencing hearing that

> "the reduction in sales at the particular... Subway involved in Scottsdale as well as most of the other Subway restaurants in Phoenix does represent a significant loss in net sales and that it did significantly affect interstate commerce")].

The Court is also unpersuaded by Ricardo's citation to the U.S. Supreme Court's *United States v. Morrison*, 529 U.S. 598 (2000). See Reply at 24:13-24. The *Morrison* Court applied the Commerce Clause analytical framework from *United States v. Lopez* 514 U.S. 549 (1995) to hold that the Violence Against Women Act was an unconstitutional exercise of Congress' Commerce Clause powers because gender motivated crimes of violence "are not, in any sense of the phrase, economic activity." 529 U.S. at 613. In his Reply, Ricardo characterizes Morrison's holding to be that "only where economic activity substantially affects interstate commerce [] will legislation regulating that activity be sustained." Reply at 24:13-17 (emphasis in original). Ricardo's view of Morrison is inapposite. The Supreme Court's "substantially affects" jurisprudence arises when Congress attempts to regulate intra-state economic activity; when that occurs, the economic activity must "substantially affect []" interstate commerce to survive Commerce Clause scrutiny. *See* 529 U.S. at 609-10 (quoting *Lopez's* statement that "[w]here economic activity substantially affects interstate

commerce, legislation regulating that activity will be sustained").

The *Morrison* Court added nothing new to the "substantially-affects doctrine which the *Lopez* Court had already canvassed- an important observation in light of the Ninth Circuit's reliance on *Lopez* in rejecting this precise claim in *Juvenile Male*. *See* 118 F.3d at 1348. In any event, it appears that the need to resolve whether an individual act "substantially affects" interstate commerce in the aggregate only arises when the act itself concerns solely *intra*-state activities, not activities which directly impinge (however slightly) on *inter*-state commerce such as conspiring to violate the RICO statutes:

> Because the Hobbs Act is concerned solely with *inter* state, rather than *intra* state, activities, we conclude that *Lopez's* "substantially affects" test is not applicable... Like the Hobbs Act, the RICO statue contains a similar jurisdictional requirement. *See* 18 U.S.C. § 1962(a), § 1962(b), or § 1962(c) ("any enterprise engaged in, or the activities of which affect, interstate or foreign commerce"). Thus, the RICO statute, like the Hobbs Act, regulates activities which, in the aggregate have a substantial effect on interstate commerce; hence, the "de minimis character of individual instances

> under [the] statute is of no consequence. " *Lopez*, 514 U.S. at 558, 115 S.Ct. at 1629 (citation omitted). [*Juvenile Male*, 118 F. 3d at 1348 (emphasis in original; some citations and internal quotation marks omitted); *accord Morrison*, 529 U.S. at 617 ("[w]e accordingly reject the argument Congress may regulate *noneconomic*, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce" [emphasis added]).

In a later case that reaffirmed the RICO statute's constitutionality in the face of a Lopez challenge, the Ninth Circuit quoted from *Juvenile Male* and bluntly held that "*Lopez's* substantial effects' test is inapplicable" to the RICO statutes. *Frega*, 179 F.3d 800 (contrasting a bribery-and-mail-fraud-based RICO conspiracy form Lopez's guns-near-schools scenario which had "nothing to do with 'commerce' or any sort of economic enterprise'" [*quoting Lopez*, 514 U.S. at 561]).

Given the Ninth Circuit's rejection of Ricardo's argument when offered by his co-defendants on direct review, Ricardo's counsel failure to raise this point did not constitute ineffective performance. No prejudice would have arose either, however, as both this Court and the Ninth Circuit would have denied the argument in light of *United States v. Juvenile Male*, *See, e.g.*,

Appendix E

United States v. Red Frame Parasail, 160 F. Supp. 2d 1048, 1057-58 (D. Ariz. 2001)(Broomfield, J.) (upholding constitutionality of Airborne Hunting Act against a *Lopez/Morrison*-based motion to dismiss because, unlike those cases' fact patterns, the Act's prohibition on airborne-based hunting "directly addresses economic activity: hunting" [emphasis added]).

The Court denies the fourteenth ground for relief.

Ground XV: Ineffective assistance of counsel based on failing to object to jury charge that failed to provide that an "enterprise" is separate from the "pattern of racketeering" in which it engages.

In his fifteenth ground, Ricardo argues that his trial counsel failed to object to the Court's jury instructions under count 17's RICO-conspiracy charge which allegedly failed to apprize the jury of the requirement that the existence of an "enterprise" must be independently proven by the government- and cannot be found merely through the "pattern of racketeering" in which the purported "enterprise" engages. See Motion at 10.

The government responds by observing that the disputed jury instruction in fact made clear that the "enterprise" must be found to exist (if at all) independently from the alleged existence of the racketeering pattern: "The enterprise element of RICO requires that the organization, formal or informal, be an entity separate and apart from the pattern of activity in which it engages." RT

(05/08/97) at 80:14-18, referred to by the government in Response at 30:5-8.

Ricardo replies by focusing on the Court's following "enterprise" instruction, which he contends improperly instructed the jury that the "enterprise" and the "pattern of racketeering activity" are the same thing: "The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an ongoing basis is adequate to satisfy the separate existence requirement." RT (05/08/97) at 81:12-18, referred to by Ricardo in Reply at 25:17-23.

Ricardo's counsel did not provide ineffective assistance by failing to object here, as the instruction that overseeing several *different predicate offenses* can satisfy the separate-existence requirement does not blur the distinction between "enterprise" and the pattern of racketeering enterprise." *See* generally *United States v. Binder*, 10 F.3d 1468, 1473-75 (9th Cir. 1993). Ricardo has neither specifically explained how the function-of-overseeing instruction improperly blurs the enterprise/pattern-of-racketeering distinction or offered any reasoning on how the instruction was otherwise improper.

The Court denies the fifteenth ground for relief.

Ground XVI: Ineffective assistance of counsel based on failure to object to the incorrect jury instructions on racketeering's mens rea.

Appendix E

In his sixteenth ground, Ricardo states that his counsel proved ineffective "by not objecting to the jury charge that omitted the mens rea for one act of racketeering, and providing the incorrect mens rea for another act of racketeering." Motion at 11. After correctly observing that Ricardo does not identify the instructions to which he refers, the government asserts that "[a] review of the jury instructions provided to the jury by the court shows that with regard to the racketeering act of Hobb's Act robbery the court did instruct the jury regarding the mens rea necessary for robbery as well as the mens rea required to aid and abet that offense. (RT 05/08/97 at p. 54-56). In addition, the jury instructions provided to the jury indicated the mens read necessary for a defendant or accomplice to be found guilty of the racketeering act of tampering with a witness. (RT 05/08/97 at p. 71-73)." Response at 30:12-19. Ricardo replies that "the government fails to identify or quote that supposed instruction or to show how it relates specifically to the Hobb's [A]ct, a different statute than mentioned by the government in their reply. The government's position is that instructions relating to 'overt acts' are good enough to meet the mens rea requirement. Since they are not 'acts of racketeering' they are not sufficient to meet the requirement as related to 18 U.S.C. § 1962. *Richardson [v. United States*, 526 U.S. 813 (1999)] holds that the predicate acts- or acts of racketeering- are elements that must be set forth in the indictment. Since [Ricardo] Briones' indictment

did not set forth any acts of racketeering or identify the mens rea for that crime, Count 17 must be vacated." Reply at 26:17-28 (emphasis in original).

Ricardo's counsel's failure to object to the disputed jury instructions did not constitute ineffective performance. The jury instruction regarding count 12's tampering-with-a-witness charge contained the requirement that the jury could not convict Ricardo unless it found that the government had proved certain elements "beyond a reasonable doubt" including that" on or about April 5, 1995 the defendant *knowingly* intimidated, threatened or used physical force against Norval Antone" and the "the defendant did so *intending* to hinder, delay, or prevent the ... communication of information relating to the commission or possible commission of a Federal offense to a law enforcement officer of the United States." RT (05/08/97) at 71:14-72:8 (emphasis added). The jury instruction regarding count 17's conspiracy-to-participate-in-a-racketeering-enterprise charge similarly contained the required language that the jury could not convict Ricardo of breaching 18 U.S.C. § 1962 (d) unless the government proved, "separately as to each defendant," each element "beyond a reasonable doubt" including that Ricardo *intentionally* joined or became a member of the conspiracy... or agreement with knowledge of its purpose." RT (05/08/97) at 78:8-79:4 (emphasis added). The Court also cross-referenced its conspiracy instructions, which stated that "[i]t is not enough, however, that [the conspirators] simply

met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a *plan* to commit the crime alleged in the indictment as an object of the conspiracy. [¶] One becomes a member of a conspiracy by *willfully* participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy." RT (05/08/97) at 83:23-84:3, cross-referencing *id.* at 58:5-19 (emphasis added).

The indictment itself also confirmed to the law. Under count 12, the indictment alleges that Ricardo and Riley Briones, Jr. "*knowingly*" used physical force against Norval Antone by pistol whipping him in the face to prevent his communication with law enforcement regarding the Subway incident. Indictment at 9:16-23. Under count 17, the indictment alleges that Ricardo was one of the gang members who "unlawfully, knowingly, willfully, and intentionally conspired to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering, as that term is defined by 18 U.S.C § 1961 (1) and (5). It was part of the conspiracy that each defendant agreed to the commission of two acts of racketeering in the conduct of the affairs of the enterprise." Indictment at 13:18-14:3.

Contrary to Ricardo's reading, the indictment spells out the various overt acts which ,

indeed constitute racketeering: tampering with a witness and the Subway robbery. The correctly-instructed jury's conclusion that Ricardo conspired to commit racketeering is substantiated by Ricardo's substantive conviction for count 12's witness tampering and by his agreement to adopt the gang's goal and helping to facilitate its aims including the eventual robbery and murder at the Subway restaurant. Finally, Ricardo's citation to Richardson is unpersuasive because that case turned on the statutory construction of a statute under which Ricardo was never charged: 21 U.S.C. § 848 (a) (forbidding any "person" from "engag[ing] in a continuing criminal enterprise"). See *Richardson*, 526 U.S. at 815; see also *United States v. Chong*, 98 F. Supp. 2d 1110, 1117 n.2 (D. Hawai'i 1999) ("the *Richardson* Court simply held that, in a death penalty case brought under the continuing criminal enterprise section of [21 U.S.C.] § 848, the jury must unanimously agree about which specific violations make up the continuing series of violations". Even if *Richardson* applied by analogy, however, the jury instructions in this case conformed to Ricardo's reading of *Richardson* by "set[ting] forth in the indictment "the" predicates acts" or acts of racketeering" which constitute the count 17's elements. *Accord* Reply at 26:24-28; Indictment at 14:4-17:1 (detailing the overt acts of racketeering under count 17).

Because Ricardo's counsel did not perform ineffectively, this ground for relief is denied.

Appendix E

Ground XVII: Ineffective assistance of counsel based on failure to file a pre-trail motion challenging counts eleven, fifteen, and seventeen as void for vagueness.

In his seventeenth ground, Ricardo argues that his trial counsel rendered ineffective assistance in failing to file a pre-trail motion to challenge counts 11, 15, and 17 on void-for-vagueness grounds. *See* Motion at 11.

As for the specificity of counts 11 and 15 (assault with a dangerous weapon- 18 U.S.C § 113(a)(3) and (2)), the indictment provides a date, location, the victim's name, and the type of dangerous weapon (a rifle and shotgun, respectively), and the applicable federal statutes. *See* Indictment at 9:9-15 and 10:12-17. As a matter of law, the federal assault statute under which the government indicted Ricardo is not unconstitutionally vague. *See United States v. Dupree*, 544 F.2d 1050, 1052 (9th Cir. 1976 (per curium) (reversing district court's void-for-vagueness-based dismissal of federal-assault indictment under 18 U.S.C § 113; "[u]se of this common-law definition of assault will render 18 U.S.C. § 113 (c) sufficiently certain to give a person of ordinary intelligence fair notice that his contemplated activity is forbidden"), *reaffirmed in United States v. Spencer*, 839 F. 2d 1341, 1343-44 (9th Cir. 1988) (citing *Dupree* for statement that "[t]his court has held that the common-law meaning of a common-law term used in a federal criminal statute is a source of statutory precision in

determining whether a statute is impermissibly indefinite. A statute is not impermissibly indefinite if it gives a person of ordinary intelligence fair notice that his contemplated activity is forbidden").

As for the specificity of count 17 (conspiracy to participated in a racketeering enterprise- 18 U.S.C. § 1962 (d)), the indictment sufficiently spells out the elements of the crime. As a matter of law, the Ninth Circuit has rejected the contention that the RICO statutes suffer from unconstitutional vagueness. *See e.g., United States v. Campanale*, 518 F. 2d 352, 364 (9th Cir. 1975) ("[w]ith respect to the argument that this statute is vague and ambiguous, it is true that, if undefined, terms such as 'pattern of racketeering activity' would be unmanageable. Any ambiguity is cured by 18 U.S.C. § 1961, which defines 'racketeering activity' with reference to specific offenses, 'pattern of racketeering activity' with reference to a definite number of acts of 'racketeering activity' within specified time periods, and 'enterprise' and 'person' with standard language of established meaning. The concept of affecting interstate or foreign commerce is so well imbedded in federal law as not to mislead anyone who desires to conform his conduct to the requirements of this law"); *Blinder*, 10 F.3d at 1475, *reaffirmed in Frega*, 179 F.3d at 801 n.4 (citing *Blinder* for observation that "[t]o the extent that [the defendant] challenges RICO as unconstitutionality of RICO against vagueness attacks"); *accord United States v. Keltner*, 147 F.3d 662, 667 (8th Cir. 1998) ("[e]very circuit which has

addressed the void-for-vagueness issue... has held the RICO statute is not unconstitutionally vague. We join our sister circuits in holding that the RICO statute is not unconstitutionally vague" [footnote omitted]). Ricardo's counsel did not perform defectively in failing to file a pre-trial challenge to counts 11, 15, and 17 because these counts were not unconstitutionally vague.

The Court denies the seventeenth ground for relief.

Ground XVIII: Ineffective assistance of counsel based on failure to object to the count-17 jury instruction.

In his eighteenth ground, Ricardo alleges ineffective assistance of counsel based on his attorney's failure to object to the count-17 jury instruction's alleged misinterpretation of 18 U.S.C. § 1951(a) (establishing 20-year prison term upon "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in a commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section..."). *See* Motion at 11-12. Ricardo asserts that the instruction's reference to two violations of 18 U.S.C. § 1951 (a) is flawed because there was only one violation of that statute: the Subway

robbery. *See id.*[11] "By including the two Hobbs Act violations (one for conspiracy and the other for the substantive offense of the one robbery) it is unknown: a) if there was a unanimous agreement by the jury of the two predicate acts, and b) if in fact the jury found the petitioner guilty of the 'legal insufficient' violation of section 1951 (a) that is now a nullity in that both predicated acts cannot stand." *Id.* at 12.

Ricardo's claim fails because counsel performance was not defective. The jury's finding of guilt regarding the count-17 RICO conspiracy is supported by two predicate acts which the enterprise committed: the Subway robbery/killing and the witness tampering. The interference-with-commerce-based Subway-robbery charge is simply one of the two underlying predicate acts which constituted the enterprise's pattern of racketeering. There is nothing improper about an indictment that charges a Hobbs Act offense as well as a Hobbs Act conspiracy. *See Salinas*, 522 U.S. at 52 (affirming defendant's RICO-conspiracy conviction despite jury's finding of not guilty on the substantive RICO count; "[o]ne can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crimes ensues, for

---

[11] Although the second overt act of witness tampering does not constitute a Hobbs Act violation, it is nonetheless one of the many racketeering acts under 18 U.S.C. § 1961 (5) that can comprise a "pattern of racketeering activity."

the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself"); *United States v. Phillips*, 577 F.2d 495, 501 (9th Cir. 1978) (affirming convictions and finding that the indictment was proper; "[t]he law is settled that a violation of the Hobbs Act is a substantive offense, separable from a Hobbs Act conspiracy").

The Court denies the eighteenth ground for relief.

Ground XIX: Ineffective assistance of counsel based on failure to object to improper sentencing.

In his final ground for relief, Ricardo contends that his trial counsel should have objected to the pre-sentence report's and this Court's alleged improper computation of Ricardo's base-offense level under United States Sentencing Guideline § 2E 1.1. *See* Motion at 12.

In its Response, the government explains how the sentencing was proper:

> The presentence report based the offense level on the applicable underlying racketeering activity pursuant to U.S.S.G § 2E 1.1. As the underlying activity of robbery (§ 2B3.1) required a cross reference to the First Degree Murder guideline § 2A 1.1, the resulting base offense level became 43. Thus, the court did not improperly calculate the petitioner's base offense level using overt acts[;] it calculated the offense level using the

underlying racketeering act of robbery and the cross references that necessarily applied. [Response at 31:22-32:1].

In his Reply, Ricardo challenges the propriety of using the Subway murder to sentence him under the RICO-conspiracy charge by pointing to the government's contradictory position: in justifying Police Detective Auerbach's in-court rendition of Arlo Eschief's out-of-court statements, the government assures the Court that Ricardo was not charged in connection with the Subway incident under counts 1 and 2 so Ricardo lacks standing to challenge Eschief's statements against him (or his counsel's performance in relation to the statements); but here on sentencing, the government urges the Court to cross-reference the Subway murder in determining Ricardo's sentence under count 17. See Reply at 29:19-20 ("[t]his is more than a cross reference [;] it is a double cross").

The Court agrees with Ricardo that Detective Auerbach's rendition of Arlo Eschief's out-of-court statements implicated him in the Subway incident and hence Ricardo retains standing to challenge his trial counsel's effectiveness in relation to the detective's rendition of what Eschief purportedly told the police. But Ricardo's ability to discern a contradiction in the government's position does not refute the government's explanation of how this Court's sentencing calculation complied with federal law. Without more, this ground for relief is denied

because Ricardo has not demonstrated his counsel's deficient performance.

CONCLUSION AND ORDER

IT IS ORDERED that, for the foregoing reasons, the Court denies Ricardo Briones' motion to vacate in its entirety.
DATED this 31 day of March, 2003

/s/ Robert C. Broomfield
Senior United States District Judge

APPENDIX F -MEMORANDUM*

NOT FOR PUBLICATION

FILED MARCH 17, 2006
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 03-16300
D.C.Nos. CV-99-02094-RCB-04
CR-96-00464-RCB-04

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

RILEY BRIONES, JR., also known as Spitz Mr.,
Defendant-Appellant.

NO. 03-16302
D.C.Nos. CV-99-02094-RCB-03
CR-96-00464-RCB-03

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

RILEY BRIONES,SR., also known as Joker
Defendant-Appellant

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Exhibit "A"

Appendix F

Submitted March 8, 2006[12]

Before: CANBY, BEEZER AND KOZINSKI, Circuit Judges.

In these consolidated appeals, Riley Briones, Sr. ("Riley, Sr.") and his son Riley Briones, Jr. ("Riley, Jr.") appeal pro se from the district court's judgments denying their 28 U.S.C. § 2255 motions, challenging their convictions and sentences for various crimes related to their activities as gang members. We have jurisdiction pursuant to 28 U.S.C. § 2253. We review do novo, *see United States v. Rodrigues*, 347 F.3d 818, 823 (9th Cir. 2003), and we affirm.

The only issue certified for Riley, Jr.'s appeal is whether the admission of an informant's out-of-court statements violated his Sixth Amendment Confrontation Clause rights. By failing to raise it in his opening brief, where he argues only an uncertified ineffective of assistance of counsel claim, Riley, Jr. has waived the issue. *See United States v. King*, 257 F.3d 1013, 1029 n.5 (9th Cir. 2001).

Riley, Sr. contends his trial counsel provided ineffective assistance by failing to investigate and argue effectively an alleged Confrontation Clause violation. To demonstrate ineffective assistance of counsel, Riley, Sr. must establish both his counsel's

---

[12] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34 (a) (2).

performance was deficient and that the deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because Riley, Sr. counsel adequately addressed the Confrontation Clause issue under the law as it existed at the time of trial, his contention fails. *See Lockhart v. Fretwell*, 506 U.S. 364, 371-72 (1993) (explaining that, under *Strickland*, the assessment of the reasonableness of counsel's performance is based on the law at the time of counsel's conduct).

Riley, Sr. also contends his trial counsel rendered ineffective assistance by failing to request a specific unanimity jury instruction requiring the jury to agree as to the predicate acts underlying his conviction for conspiracy to participate in a racketeering enterprise. Even assuming counsel was deficient in failing to request a unanimity instruction, we conclude that appellant was not prejudiced: The jury's verdict on Counts 2, 12 and 14 make clear its unanimity with respect to the required overt acts alleged in the conspiracy count. *See* 18 U.S.C § 1961 (5) ("pattern of racketeering activity" requires at least two predicate acts). Accordingly this contention also fails.

Riley, Sr.'s contention that he is entitled to relief under *Blakely v. Washington*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005), is foreclosed because such relief is not available retroactively on collateral review. See *United States v. Cruz*, 423 F.3d 1119 (9th Cir. 2005) (holding that *Booker* does not apply retroactively in

§ 2255 proceedings where the conviction was already final when *Booker* was decided).

To the extent the appellants argue uncertified issues, we construe such arguments as a motion to expand the Certificate of Appealability, and we deny the motion. See 9th Cir. R. 22-1 (e); *Hiivala*, 195 F.3d at 1104-05.

The Clerk shall file Riley, Sr.'s motion to take judicial notice. Appellants' motions to take judicial notice are denied.

AFFIRMED.

APPENDIX G -JUGDMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 03-16300
D.C.Nos. CV-99-02094-RCB-04

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

RILEY BRIONES, JR., also known as Spitz Mr.,
Defendant-Appellant.

NO. 03-16299
D.C.Nos. CV-99-02095-RCB-02

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

RICARDO BRIONES,
Defendant-Appellant

JUDGMENT

Appeal from the United States District Court for the District of Arizona (Phoenix).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 03/17/06